Supt & Read

QUARLY

SUPREME COURT OF THE UNITED STATES.

No. 202.

CHARLES COMSTOCK ET AL., PLAINTIFFS IN ERROR,

vs.

JEFFERSON CRAWFORD.

N ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

GOVERNMENT PRINTING OFFICE.

SUPREME COURT OF THE UNITED STATES.

No. 202.

CHARLES COMSTOCK ET AL., PLAINTIFFS IN ERROR,

vs.

JEFFERSON CRAWFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Declaration, notice, affidavit, &c	2	1
Plea of defendant	4	3
Verdict of jury	5	3
Motion for new trial	6	4
Judgment	7	4
Bill of exceptions	9	4
Bond	98	38
Writ of error	100	38
Citation and service	101	39

1 UNITED STATES OF AMERICA,
District of Wisconsin, ss:

I, A. Scott Sloan, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, and of the whole thereof now on file, and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this thirtieth day of November, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighty-ninth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

Fees, $32 75.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a stated term of the circuit court of the United States of America for the ninth circuit and district of Wisconsin, begun and held according to law, on the second Monday of September, A. D. 1864, at the city of Milwaukee, in said district of Wisconsin.

Present and presiding, the Hon. Samuel F. Miller, associate justice of the Supreme Court of the United States, assigned to said circuit court, and the Hon. Andrew G. Miller, district judge.

On the twelfth day of the term, to wit, on the twenty-fourth day of September, A. D. 1864, the following proceedings were had, to wit:

CHARLES COMSTOCK, HELEN E. COMSTOCK, JOHN R. Comstock, Phebe C. Allen, Thirza A. Anderson, Mahala A. Hutchinson, Aaron A. Hutchinson, Adaline A. Hyde, William S. Hyde, Thomas E. Whitney, Sarah E. Davenport, and John Davenport

vs.

JEFFERSON CRAWFORD.

Be it remembered, that heretofore, to wit, on the second day of May, 1864, came the above-named plaintiffs, by their attorneys, Messrs. Buttrick & Hill, and filed their declaration in ejectment with a notice for an appearance on the part of the defendant, on the first Monday of May instant, and an affidavit of authority to commence this action, and proof by affidavit of service thereof on the defendant by delivering to him a copy of the declaration, affidavit, and notice, and showing him the originals, on the 15th day of April, 1864, at Hazel Green, in said district of Wisconsin, and also filed bond for costs; and on the same day, on motion of Buttrick & Hill, plaintiffs' attorneys, "ordered that the defendant plead to the plaintiffs' declaration on file, by the first Monday of June next, or his default will be entered;" which said declaration, notice, affidavit of authority to commence suit, and affidavit of service, is in the words and figures following, to wit:

2 Circuit court of the United States of America in and for the district of Wisconsin.

DISTRICT OF WISCONSIN, *ss:*

Of the first Monday of May, A. D. 1864, Charles Comstock, who is a citizen and resident of the State of Pennsylvania; Helen E. Comstock and her husband, John R. Comstock, who are citizens and residents of the State of Con-

necticut; Phebe C. Allen, Thirza A. Anderson, and Mahala A. Hutchinson and her husband, Aaron A. Hutchinson, who are citizens and residents of the State of New Jersey; Adaline A. Hyde and her husband, William S. Hyde, who are citizens and residents of the State of Ohio; and Thomas E. Whitney and Sarah E. Davenport and her husband, John Davenport, who are citizens and residents of the State of New York, the plaintiffs in this action, by Buttrick & Hill, their attorneys, complain of Jefferson Crawford, who is a citizen and resident of the State of Wisconsin—

For that the said plaintiffs heretofore, to wit, on the first day of July, in the year of our Lord one thousand eight hundred and forty-five, were together seized and possessed of the undivided three-tenths (3-10) part of all those certain pieces or parcels of land situate, lying, and being in the county of Grant, and State of Wisconsin, to wit: The northeast quarter and the west half of the southeast quarter of section thirty-five, (35,) the west half of the southwest quarter of section twenty-five, (25,) the S. ½ of sec. 26, and the northwest quarter of the northwest quarter of section thirty-six, (36,) all in town one, (1,) range one (1) west of the fourth principal meridian, of great value, to wit, of the value of five thousand dollars, wherein and whereto the said plaintiffs have and claim an estate in fee; and being so possessed thereof, the said defendant afterwards, to wit, on the third day of December, in the year of our Lord one thousand eight hundred and fifty-eight, entered into and ejected the said plaintiffs from the said premises, to the possession whereof the said plaintiffs are entitled, which said possession the said defendant now unlawfully and unjustly withholds, from the said plaintiffs, to the damage of the plaintiffs five thousand dollars, and therefore they bring suit, and ask that the plaintiffs do have and recover of and from the said defendant the possession of said premises and damages as aforesaid, together with costs, &c.

BUTTRICK & HILL,
Plaintiffs' Attorneys, Milwaukee, Wisconsin.

To Jefferson Crawford:

You are hereby notified that the declaration with a copy whereof you are now herewith served, and to which copy this notice is subjoined, will be filed in the office of the clerk of said court, in the city of Milwaukee, on the first Monday of May, A. D. 1864, that upon filing the same a rule will be entered requiring you to appear and plead to the said declaration on the next rule day after the filing of said declaration, to wit, the first Monday of June, A. D. 1864, and that if you neglect so to appear, a judgment will be entered against you, and the plaintiffs will recover possession of the premises specified in said declaration, together with damages and costs.

Yours, &c.,

BUTTRICK & HILL, *Plaintiffs' Attorneys.*

3 District of Wisconsin, *ss:*

Edward J. Hill, being duly sworn, deposes and says that Edwin L. Buttrick and deponent are the attorneys for each of the plaintiffs named in the within declaration, and that they have written authority from each one of said plaintiffs to commence such action against the defendant named in said declaration. And further deponent saith not.

EDW'D J. HILL.

Subscribed and sworn to before me this eighth day of April, A. D. 1864.

A. HALL, *Notary Public Mil. County.*

DISTRICT OF WISCONSIN, ss:

Ahira Hall, being duly sworn, deposes and says that he served the within and foregoing declaration, affidavit, and notice, by delivering a copy thereof and showing this original to Jefferson Crawford, the within-named defendant, on the 15th day of April, A. D. 1864, at Hazel Green, in said district.

A. HALL.

Subscribed and sworn to before me this 30th day of April, A. D. 1864.

FRANCIS BLOODGOOD,
U. S. Circuit Court Com'r, Dist. of Wisconsin.

I hereby deputise Ahira Hall to serve and return this within declaration, affidavit, and notice.

Filed May 2, 1864.

4 And afterwards, on the 27th day of May, 1864, came the defendant, by his attorneys, Messrs. Mills & Lakin, and filed his plea, which plea is in the words and figures following, to wit:

Circuit court of the United States for the district of Wisconsin.

JEFFERSON CRAWFORD, defendant,
ads.
CHARLES COMSTOCK, HELEN E. COMSTOCK, AND HER HUSband, John R. Comstock, Phebe C. Allen, Thirza A. Anderson, Mahala A. Hutchinson and her husband, Aaron A. Hutchinson, Adaline A. Hyde and her husband, William S. Hyde, Thomas E. Whitney, Sarah E. Davenport and her husband, John Davenport.

And the said defendant Jefferson Crawford, by J. T. Mills and George W. Lakin, his attorneys, comes and says that he is not guilty of unlawfully withholding the premises claimed by the said plaintiffs, as alleged in said declaration of the said plaintiffs. And of this the said defendant puts himself upon the country. And the said plaintiffs doth the like, &c.

J. T. MILLS & GEORGE W. LAKIN,
Defendant's Attorneys.

Due service of a copy of the above plea and notice of the filing thereof admitted.

May 26th, 1864.

BUTTRICK & HILL, *Plaintiffs' Attorneys.*

Filed May 27th, 1864.

5 And afterwards, on the twenty-fourth day of September, A. D. 1864, came the parties, by their counsel, and the issue herein came on to be tried. Whereupon a jury was called to try the same, who came, to wit: Richard B. Winsor, J. Fowle, David Moul, George Robinson Hiram R. Bond, C. G. Heath, Robert Menzies, Jared Thompson, George J. Fowler, A. W. Manning, Francis Wright, and A. Randall, twelve free, honest, and lawful men of the district, who were severally sworn and impanneled. And the trial not being concluded, the same was adjourned until Monday morning.

September 26, 1864, this day came the parties by their counsel, and the trial of the issue herein was resumed, and the jurors of the jury aforesaid being charged by the court upon their oaths, respectively, do say that the

defendant is not guilty of unlawfully withholding from the plaintiffs the possession of the premises described in the declaration, and that the
6 plaintiffs are not entitled to recover the possession of the same.

And afterwards, to wit, on the 27th day of September, 1864, came the parties, by their counsel, and the plaintiffs filed their motion for a new trial in these words, to wit:

Circuit court of the United States of America in and for the district of Wisconsin.

CHARLES COMSTOCK *et al.*
vs.
JEFFERSON CRAWFORD.

And now come the plaintiffs, by Buttrick & Hill, their attorneys, and move the court that the verdict herein be set aside and for a new trial
7 herein, for the reasons that the court erred in admitting the records of the appointment of Edwin Ripley administrator of the estate of Mathias Calvin Comstock, in evidence over the objections taken upon said trial by the plaintiff's counsel, and in admitting the license and papers upon which the same is founded as well as all other records from the probate court of Grant County in evidence, and for the reason that said verdict is contrary to and against law, and contrary to and against evidence in all respects, and for the further reason that the court erred in charging the jury that the defendant had shown title out of the plaintiff's superior to the plaintiff's title.

Dated September 27, A. D. 1864.

BUTTRICK & HILL, *Plaintiffs' Att'ys.*

And thereupon it is ordered by the court that said motion be, and the same is hereby, overruled.

Whereupon it is considered and adjudged by this court now here that the said defendant do have and recover of the said plaintiffs, Charles Comstock, Helen E. Comstock and her husband, John R. Comstock, Phebe C. Allen, Thirza A. Anderson, Mahala A. Hutchinson and her husband, Aaron A. Hutchinson, Adaline A. Hyde and her husband, Willliam S. Hyde, Thomas E. Whitney, Sarah E. Davenport and her husband, John Davenport, the sum of one hundred and seventy-two dollars and fifty cents, his costs about
8 his said defence in this behalf by him expended, and that he have execution therefor.

Judgment roll signed September 27, 1864. Costs $172 50.

A. SCOTT SLOAN, *Clerk.*

And afterwards, on the 27th day of September, A. D. 1864, came the plaintiffs, by their attorneys, and filed their bill of exceptions duly allowed and signed, in the words and figures following, to wit:

9 Circuit court of the United States of America in and for the district of Wisconsin.

CHARLES COMSTOCK *et als.*
vs.
JEFFERSON CRAWFORD.

DISTRICT OF WISCONSIN, *ss:*

Be it remembered, that at the city of Milwaukee, in said district, before the circuit court of the United States of America, holden in and for said district, present Hon. Samuel F. Miller and Hon. Andrew G. Miller, judges, on the 24th day of September, A. D. 1864, at the September term of said court,

came the parties to this action to try the issue joined herein, and a jury of twelve good and lawful men residing in said district having been empaneled and sworn to sustain the issue on their part, the plaintiffs proved—

1. Patents from the United States of America to John Ami Merle and Matthias Calvin Comstock, embracing lands described in the declaration herein.

2. Death of Matthias Calvin Comstock and descent of his title to plaintiff Charles Comstock, Lydia Stratten, Deborah Allen, Louisa Ripley, and Elizabeth Whitney, each the undivided one fifth thereof.

3. Death of Elizabeth Whitney and descent of her title to plaintiffs Thomas E. Whitney, Helen E. Comstock, and Sarah E. Davenport.

4. Death of Deborah Allen and descent of her title to plaintiffs Thirsa A. Anderson, Phebe C. Allen, Adaline A. Hyde, and Mahala A. Hutchinson.

5. The value of the interest claimed by the plaintiffs in the premises to be $3,000 and upwards.

4. That defendant was in possession of said premises at the commencement of the action, and that Matthias Calvin Comstock was never a resident or inhabitant of Wisconsin, and that all the plaintiffs never were inhabitants, residents, or citizens of the State of Wisconsin or of the Territory of Wisconsin.

And rested.

And to sustain the issue on his part defendant produced the following record, license, and deeds, to wit:

Recorded in Book L, page 95.

At a special court of probate, held at the probate office, in the town of Mineral Point, in and for the county of Iowa, letters of administration were by me duly granted to Charles Comstock, of all and singular the goods and chattels, rights and credits that were of the estate of Matthias C. Comstock, late of Galena, in the State of Illinois, deceased, he first entering into bonds to this court in the sum of three thousand dollars, Moses Muker and Charles Gear as sureties, which were approved by this court, and taken an oath for the faithful performance of his duties as administrator, which said bond and oath are on file in this office; which said letters of administration are in the words following, that is to say:

TERRITORY OF WISCONSIN, *Iowa County, ss:*

To all to whom these presents shall come, greeting:

Know ye that whereas Matthias C. Comstock, of the county of Jo Daviess and State of Illinois, died intestate, as it is said, about the 29th day of November, A. D. 1838, having at the time of his decease personal property in this Territory which may be lost, destroyed, or diminished in value if speedy care be not taken of the same: To the end, therefor, that the said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint Charles Comstock, of the county of Jo Daviess and State of Illinois, administrator of all and singular the goods and chattels, rights and credits of the said Matthias C. Comstock at the time of his decease, with full power and authority to secure and collect the said property and debts wheresoever the same may be found in this Territory, and in general to do and perform all other acts which now or hereafter may be required of him by law.

In witness whereof, I hereunto set my hand and affix the seal of office, at the town of Mineral Point, in the county of Iowa, this fifth day of September, in the year of our Lord eighteen hundred and thirty-nine.

[SEAL.] PARLEY EATON, *Judge of Probate.*

A true record.

12 STATE OF WISCONSIN, *Iowa County, ss:*

I, John Bonner, county judge of Iowa County, in the State of Wisconsin, do hereby certify that the within and foregoing copy has been by me compared with the original record in the office of the judge of the county court of said county, and that the same is a correct transcript therefrom and of the whole and every part thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Dodgeville, this first day of September, A. D. 1864.

[L. S.] JOHN BONNER, *County Judge, &c.*

TERRITORY OF WISCONSIN, *Iowa County, ss:*

To all to whom these presents shall come, greeting:

Know ye that, whereas Matthias C. Comstock, of the county of Jo Daviess and State of Illinois, died intestate, as it is said, on or about the 29th day of November, A. D. 1838, having at the time of his disease personal property in this Territory which may be lost, destroyed, or diminished in value if speedy care be not taken of the same: To the end, therefor, that the said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint Charles Comstock, of the county of Jo Daviess and State of Illinois, administrator of all and singular the goods and chattels, rights and credits which were
13 of the said Matthias C. Comstock at the time of his decease, with full power and authority to secure and collect the said property and debts wheresoever the same may be found in this Territory, and in general to do and perform all other acts which now are or hereafter may be required of him by law.

In witness whereof, I hereunto set my hand and affix the seal of office, at the town of Mineral Point, in the county of Iowa, this fifth day of September, in the year of our Lord eighteen hundred and thirty-nine.

[L. S.] PARLEY EATON, *Judge.*

STATE OF WISCONSIN, *Iowa County, ss:*

I, John Bonner, county judge of Iowa County, in the State of Wisconsin, do hereby certify that the above and foregoing copy has been by me compared with the original on file and of record of the office of the judge of the county court of said county, and that the same is a correct transcript therefrom and of the whole and every part thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Dodgville, this first day of September, A. D. 1864.

[L. S.] JOHN BONNER, *County Judge, &c.*

Letters of administration to Charles Comstock, returned and filed this 12th day of Feb'y, 1840.

PARLEY EATON, *Judge of Probate.*

14 Know all men by these presents that we, Charles Comstock, of the State of Illinois, and Moses Muker and Charles Gear, within the Territory of Wisconsin, are holden and stand firmly bound and obliged unto Parley Eaton, judge of probate of wills, and granting administration in the county of Iowa, in the full sum of three thousand dollars, lawful money of the United States, to be paid unto the said Parley Eaton, his successor in office or assigns, to the true payment whereof we do bind ourselves and each of us, and our and each of our heirs, executors, and administrators, jointly and severally, for the while and in whole, firmly by these presents. Sealed with our seals, dated this fifth day of September, 1839. The condition of this

obligation is such that if the above-bounden Charles Comstock do make or cause to be made a true and perfect inventory of all and singular the goods, chattels, right, and credits of the said deceased, which shall have come to his hands possession, or knowledge of the said Charles Comstock, or into the hands or possession of any other person or persons for him, and the sum so made do exhibit or cause to be exhibited into the registry of the court of probate for the said county of Iowa, at or before the 5th day of December next ensuing, and the same goods and chattle, rights and credits of the said deceased at the time of his death, which shall at any time after come to the hands or possession of the said Charles Comstock, or into the hands or possession of any other person or persons for him, do well and truly administer according to law. And further, do make or cause to be made a just and true account of his said administror, upon oath, at or before the fifth day of September, which will be in the year 1840, and all the rest and residue of said goods, chattles, rights, and credits which shall be found remaining upon the account of the said administrator, the same first being examine and allowed by the judge or judges for the time being of the probate of wills, and granting administration within the county of Iowa aforesaid, and shall deliver and pay unto such person or persons, respectively, as the judge or judges by his or their decree or sentence pursuent to law shall appoint or limit. And if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the court of probate for the county of Iowa, making request to have it allowed and approved accordingly, if the said Charles Comstock, within bounden being thereunto required, do render and deliver the said letters of administration, approbation of such testament being had and made into the said court, then the above written obligation to be void, and of none effect; or else, to remain and abide in full force and virtue.

CHARLES COMSTOCK. [SEAL.]
CHARLES GEAR. [SEAL.]
M. MUKER. [SEAL.]

Sealed in presence of.—
NIRIAN KNOWLTON.
AUSTIN HAMILTON.

Charles Gear and Moses Muker as sureties. Approved this 5th day of September, 1839.

PARLEY EATON, *Judge of Probate.*

16 STATE OF WISCONSIN, *Iowa County, ss:*

I, John Bonner, county judge of Iowa County, in the State of Wisconsin, do hereby certify that the above and foregoing copy has been by me compared with the original on file in the office of the judge of the county court of said county, and that the same is a correct transcript therefrom, and of the whole and every part thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court, at Dodgville, this first day of September, A. D. 1864.

JOHN BONNER, *County Judge, &c.*

Charles Comstock, administrator's bond. The estate of M. C. Comstock. Filed 5th September, 1839.

PARLEY EATON, *Judge of Probate.*

17 TERRITORY OF WISCONSIN, *Iowa County, ss:*

I do solemnly swear that I will well and truly administer all and singular the goods and chattles, rights and credits, and effects of Matthias C. Com-

stock, deceased, and pay all just claims and charges against his estate, so far as his goods, chattels, and effects shall extend and the law charge me, and that I will do and perform all other acts required of me by law, to the best of my knowledge and ability.

CHAS. COMSTOCK.

Sworn and subscribed this 5th day of September, 1839, before me.
PARLEY EATON, *Judge of Probate.*

STATE OF WISCONSIN, *Iowa County, ss:*

I, John Bonner, county judge of Iowa County, in the State of Wisconsin, do hereby certify that the above and foregoing copy has been by me compared with the original on file in the office of the judge of the county court of said county, and that the same is a correct transcript therefrom and of the whole and every part thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of the said court, at Dodgeville, this first day of September, A. D. 1864.

JOHN BONNER, *County Judge, &c.*

18 ATHENS, *Bradford County, Pa., Oct. 21st,* 1839.

Parley Eaton, Esq., Judge of Probate of Iowa County, Wisconsin Territory:

DEAR SIR: As I am not able to return to Galena to attend to the settlement of the estate of M. C. Comstock, I wish you to grant letters of administration de novo, to my friend and brother-in-law Mr. Edward Ripley.

Yours, very respectfully,

CHAS. COMSTOCK.

STATE OF WISCONSIN, *Iowa County, ss:*

I, John Bonner, county judge of Iowa County, in the State of Wisconsin, do hereby certify that the above and foregoing copy has been by me compared with the original on file in the office of the judge of the county court of said county, and that the same is a correct transcript therefrom, and of the whole and every part thereof.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at Dodgeville, this first day of September, A. D. 1864.

[L. S.] JOHN BONNER, *County Judge, &c.*

19 Probate Record Book, L, p. 125:

At a special court of probate, held the 12th day of February, in the year 1840, Charles Comstock resigned his trust as administrator of the estate of M. C. Comstock, and returned in to this office the said letters granted the 5th September, 1839; which resignation was accepted and filed in this office.

Attest: PARLEY EATON, *Judge of Probate.*

STATE OF WISCONSIN, *Iowa County, ss:*

I, John Bonner, county judge of Iowa County, in the State of Wisconsin, do hereby certify that the above and foregoing copy has been by me compared with the original record in the office of the judge of the county court of said county, and that the same is a correct transcript therefrom and of the whole and every part thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Dodgeville, this first day of September, A. D. 1864.

[L. S.] JOHN BONNER, *County Judge, &c.*

P. 126.

At a court of probate, held on the 12th day of February, 1840, Edward Ripley was appointed admistrator of the estate of Matthias C. Comstock, and entered into bail in the amount of three thousand dollars, Levi Sterling
20 and William Davidson sureties, which were approved, and bond filed, also oath filed; which said letters of administration are as follows:

TERRITORY OF WISCONSIN, *Iowa County, ss:*

To all to whom these presents shall come, greeting:

Know ye that, whereas Matthias C. Comstock, of the county of Jo Daviess and State of Illinois, died intestate, as it is said, about the 29th day of November, 1838, having at the time of his decease personal property in this Territory, which may be lost, destroyed, or diminished in value if speedy care be not taken of the same:

To the end, therefor, that the said property may be collected and preserved for those who appear to have a legal interest therein, we do hereby appoint Edwin Ripley, of the county of Jo Daviess and State of Illinois, administrator of all and sigular the goods and chattles, rights and credits which were of the said Matthias C. Comstock at the time of his decease, with full power and authority to secure and collect the said property and debts wheresoever the same may be found in this Territory, and in general to do all other acts which now or hereafter may be required of him by law.

In witness whereof, I hereunto set my hand and affixed the seal of office, at the probate office, at Mineral Point, in the county of Iowa, the 12th day of February, in the year 1840.

PARLEY EATON, *Judge Probate.*

Rcorded this 12th day of February, 1840.

PARLEY EATON, *Judge of Probate.*

21 STATE OF WISCONSIN, *Iowa County, ss:*

I, John Bonner, county judge of Iowa County, in the State of Wisconsin, do hereby certify that the within and foregoing copy has been by me compared with the original record in the office of the judge of the county court of said county, and that same is a correct transcript therefrom and of the whole and every part thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Dodgeville, this first day of September, A. D. 1864.

[L. S.] JOHN BONNER, *County Judge, &c.*

22 TERRITORY OF WISCONSIN, *Iowa County, ss:*

I do solemnly swear that I will well and truly administer all and singular the goods and chattels, rights, and credits, and effects of Matthias C. Comstock, deceased, and pay all past claims and charges against his estate so far as his goods, chattels, and effects shall extend and the law charge, and that I will do and perform all other acts required of me by law to the best of my knowledge and abilities.

EDWIN RIPLEY.

Sworn and subscribed this 12th day of February, A. D. 1840, before me.

PARLEY EATON, *Judge of Probate.*

STATE OF WISCONSIN, *Iowa County, ss:*

I, John Bonner, county judge of Iowa County, in the State of Wisconsin, do hereby certify that the above and foregoing copy has been by me compared with the original on file in the office of the judge of the county court of said county, and that the same is a correct transcript therefrom and of the whole and every part thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Dodgeville, this first day of September, A. D. 1864.

[SEAL.] JOHN BONNER, *County Judge, &c.*

23 Know all men by these presents that we, Edwin Ripley, William Davidson, and Levi Sterling, within the Territory of Wisconsin, are holden and stand firmly bound and obliged unto Parley Eaton, judge of probate of wills and granting administration in the county of Iowa, in the full sum of three thousand dollars, lawful money of the United States, to be paid to the said Parley Eaton, his successor in office or assigns, to the true payment whereof we do bind ourselves and each of us, and our and each of our heirs, executors, and administrators, jointly and severally, for the whole and in the whole firmly by these presents. Sealed with our seals, dated this 12th day of February, 1840. The condition of this obligation is such that if the above-bounden Edwin Ripley do make or cause to be made a true and perfect inventory of all and singular the goods, chattels, rights, and credits of the said Matthias C. Comstock, deceased, which shall have come to his hands, possession, or knowledge of the said Edwin Ripley, or into the hands or possession of any other person or persons for him, and the same so made do exhibit or cause to be exhibited into the registry of the court of probate for the said county of Iowa, at or before the 12th day of May, 1840, and the same goods and chattels, rights and credits of the said deceased at the time of his death which shall at any time hereafter come to the hands or possession of the said Edwin Ripley, or into the hands or possession of any other person or persons for him, do well and truly administer according to law.

24 And further, do make or cause to be made a just and true account of his said administration, upon oath, at or before the 12th day of February, which will be in the year 1841, and all the rest and residue of said goods, chattels, rights, and credits which shall be found remaining upon the accounts of the said administrator, the same being first examined and allowed by the judge or judges for the time being of the probate of wills and the granting administration within the county of Iowa aforesaid, and shall deliver and pay unto such person or persons, respectively, as the judge or judges by his or their decree or sentence pursuant to law shall appoint or limit; and if it shall appear that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the court of probate for the county of Iowa, making request to have the same allowed and approved accordingly, if the said Edwin Ripley within bounden, being thereunto required to render and deliver the said letters of administration, approbation of such testament being had and made into the said court, then the above written obligation to be void and of none effect; or else, to abide and remain in full force and virtue.

W. DAVIDSON. [L. S.]
LEVI STERLING. [L S.]
EDWARD RIPLEY. [L. S.]

Signed and sealed the day and year above written, in presence of—
ALMANSON EATON.

I do hereby approve of Levi Sterling and William Davidson as sureties on the above bond.

PARLEY EATON, *Judge of Probate.*

25 STATE OF WISCONSIN, *Iowa County, ss:*

I, John Bonner, county judge of Iowa County, in the State of Wisconsin, do hereby certify that the within and foregoing copy has been by me compared with the original on file in the office of the judge of the county court, of said county, and that the same is a correct transcript therefrom, and of the whole and every part thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Dodgeville, this first day of September, A. D. 1864.

[SEAL.] JOHN BONNER, *County Judge, &c.*

26 *Matthias C. Comstock's estate.*

GRANT COUNTY, *ss:*

Be it remembered, that at a probate court, began and held at the probate office, at Lancaster, in Grant County, W. T'y, on the 3d day of April, A. D. 1845—present, Hugh R Colter, judge—Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of Jo Daviess County, in the State of Illinois, deceased intestate, duly appointed as such administrator of the estate of said deceased, by probate justice court in and for the county of Jo Daviess aforesaid, and also duly appointed as such administrator of the estate of said deceased by the probate court in and for the county of Iowa, in the Territory of Wisconsin, this day filed in the office of the probate court of Grant County aforesaid, his written application for license and authority to sell so much of the real estate of said deceased lying and being in Grant County as may be necessary to enable said administrator to pay the sum of eight thousand dollars. Whereupon it is ordered that said application be duly filed and recorded, and which application is in the words and figures following:

Application to sell real estate.

To the hon. probate court of Grant County, Wisconsin Territory:

The undersigned, administrator of the estate of Matthias C. Comstock, late of Galena, in the county of Jo Daviess, in the State of Illinois, deceased intestate, and administrator of whose estate, real and personal, in the Territory of Wisconsin, hath been granted by the probate court in and for the county of Iowa, in said Territory, respectfully represents that the
27 personal estate of said deceased is not sufficient to pay his just debts by the sum of eight thousand dollars. And said administrator further represents to said probate court the certificate of the justice of probate of the county of Jo Daviess, in said State of Illinois, also showing the condition of said estate, and that the personal estate of said deceased is insufficient to pay the debts due from said deceased by the said sum of eight thousand dollars.

The undersigned therefor prays the probate court of Grant County aforesaid, agreeably to the statute in such case made and provided, to grant him license to sell so much of the real estate of said deceased in the county of Grant as will enable him to pay the said sum of eight thousand dollars, together with the costs and charges attending said sale.

Dated, April 3d, 1845.

EDWIN RIPLEY, *Adm'r, M. C. Comstock, dec'd.*

And the court having duly considered of said application, it is thereupon ordered that said administrator do give due notice to all persons concerned by publication of notice of said application in the Wisconsin Herald, a

weekly newspaper printed and published at Lancaster, in said Territory of Wisconsin, four weeks successively, the last publication to be prior to the 3d Saturday of May, 1845, which said third day of May, A. D. 1845, at the probate office of Lancaster, in said Grant County, the said probate court doth appoint as the time and place when and where a hearing will be had upon said application.

A true record.

Attest: H. R. COLTER, *Judge Probate.*

28 GRANT COUNTY, *ss:*

At a probate court begun and held at the probate office, in Lancaster, in the county of Grant, on the 3d Saturday of May, A. D. 1845.

Present: Hugh R. Colter, judge probate.

It appearing unto this court that due notice of the application of the administrator of the estate of Matthias C. Comstock, deceased intestate, for license and authority to sell so much of the real estate of said deceased situated in Grant County as would enable said administrator to pay the sum of eight thousand dollars of the debts due and owing from said estate, together with the costs and charges attending said sale, has been duly given by said administrator, agreeably to law and the order of this court made at a previous day, by publication of notice of said application in the Wisconsin Herald, a weekly newspaper printed and published at Lancaster, in said Territory, proof of which publication hath been duly filed in this court:

And said administrator having filed in the probate office of Grant County aforesaid the following certificate under the hand and seal of Charles G. Thomas, probate justice of the peace in and for the county of Jo Daviess, in the State of Illinois, which certificate is in the words and figures following, to wit:

STATE OF ILLINOIS, *County of Jo Daviess:*

I, Charles G. Thomas, probate justice of the peace in and for said county, do certify that the personal property belonging to the estate of Matthias C. Comstock, late of said county of Jo Daviess and State of Illinois, has been exhausted in payment of the debts of said estate, and that there are yet debts of file in this office to the amount of about eight thousand dollars against said estate unpaid.

Given under my hand and the seal of the probate court, at the probate office, in Galena, the 23d day of April, A. D. 1845.

CHARLES G. THOMAS, *P. J. P.*

And it being made to appear unto this court that it is necessary and proper that said administrator should be licensed and authorized and empowered to make sale of the real estate of said deceased in Grant County, or so much thereof as will enable said administrator to pay the sum of eight thousand, debts due and owing from said estate, due proof of the existence and amount of said debts being made to this court, and no person appearing to make or offer any objection or show cause against said application of said administrator:

The court order, adjudge, and decree that said administrator be licensed, authorized, and empowered to sell so much of the real estate of said deceased situated, lying, and being in the county of Grant, as may enable said administrator to pay the sum of eight thousand dollars, the debts due and
30 owing from said estate, together with the costs and charges attending said sale, and that license duly issue to said administrator agreeably to law.

And now on this 27th day of May, 1845, the said administrator having duly executed a bond agreeably to law, conditioned to make due sale of said real estate, and faithfully to account for the proceeds of said sale, in the penal sum of ten thousand dollars, which bond is by this court approved, a license in due form of law issued to said administrator this day.

A true record.

Attest: H. R. COLTER, *Judge Probate.*

Estate of M. C. Comstock.

TERRITORY OF WISCONSIN, *Grant County, ss:*

To the heirs-at-law and all persons interested in the estate of Matthias C. Comstock, late of Jo Daviess County, in the State of Illinois, deceased intestate:

Notice is hereby given that Edwin Ripley, administrator of all and singular the goods, chattels, rights, credits, and estate of said M. C. Comstock, deceased, hath represented unto the probate court of Grant County, Wisconsin Territory, that the personal estate of the said deceased is
31 insufficient to pay the debts which said deceased owed, by the sum of eight thousand dollars, and praying the said probate court for license and authority to sell so much of the real estate of said deceased, in said county of Grant, as may be sufficient to pay the said sum of eight thousand dollars and the costs and charges attending said sale:

The court of probate doth thereupon appoint the third Saturday of May, 1845, at one o'clock p. m., at the probate office, in Lancaster, in said Grant County, when and where all persons interested may appear and show cause, if any they have, why said application should not be granted.

Given under my hand and seal this third day of April, 1845.

H. R. COLTER, *Judge of Probate.*

GRANT COUNTY, *W. T'y:*

Jeremiah D. Spaulding, being duly sworn, says that he is publisher of the Wisconsin Herald, a weekly newspaper printed and published at Lancaster, W. T'y, and was so publisher during the publication of the annexed advertisement; that the annexed notice has been duly published in said Wisconsin Herald for four weeks successively, the last publication being previous to the 3rd Saturday of May, 1845.

J. D. SPAULDING.

Subscribed and sworn to before me this 3rd Saturday of May, 1845.

[L. S.] J. ALLEN BARBER,

Notary Public of Grant County, Wisconsin Territory.

(The probate seal being hereunto annexed, no public seal being yet provided.)

32 Mr. C. Comstock's estate. Proof of publication of application to sell real estate.

Filed 3rd Saturday of May, 1845.

H. R. COLTER, *Judge of Probate.*

Estate of M. C. Comstock, deceased.—Bond on sale of real estate.

Know all men by these presents that I, Edwin Ripley, as principal, am held and firmly bound unto Hugh R. Colter, judge of probate of Grant County, Wisconsin Territory, and to his successors in office, in the penal sum of ten thousand dollars, for payment whereof, well and truly to be made,

I bind myself, my heirs, executor, and administrator, firmly by these presents. Signed, sealed and dated May 27th, 1845.

The condition of the above bond is such that if the above-bounden Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of Jo Daviess County, in the State of Illinois, who hath this day been licensed and empowered by the probate court of Grant County, W. T'y, to sell so much of the real estate of said deceased in said county of Grant as may be necessary to enable him to pay the sum of eight thousand dollars and the costs and charges attending said sale: Now, if said Ripley shall observe all the rules and regulations and directions of the law for the sale of real estate
33 and the proceeds of such sale shall be disposed of agreeably to the rules of law, then this bond shall be void; otherwise, of full force and virtue.

[L. S.] EDWIN RIPLEY,
Adm'r of Estate of M. C. Comstock.

STATE OF WISCONSIN, *Grant County, ss:*

I, William McGonigal, county judge of Grant County, in the State of Wisconsin, do hereby certify that the foregoing copies have been by me compared with their respective originals on file and of record in the office of the judge of the county court of said county, and that the same are correct transcripts therefrom and of the whole and every part thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Lancaster, this 3rd day of September, A. D. 1864.

[L. S.] WM. McGONIGAL, *County Judge, &c.*

34 TERRITORY OF WISCONSIN, *Grant County, ss:*

The honorable probate court in and for Grant County aforesaid to Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of Joe Daviess County, in the State of Illinois, deceased intestate:

Whereas it appears by the certificate of the probate justice in and for the county of Joe Daviess aforesaid, and by the records and files of the probate court of Grant County aforesaid, that the personal estate of said deceased is not sufficient to pay his just debts by the sum of eight thousand dollars and the costs attending the said sale:

Therefore you are hereby licensed and empowered and authorized to sell so much of the real estate of said deceased at public auction, agreeably to law, as will be sufficient to pay said sum of eight thousand dollars and the legal costs and charges attending said sale. Before making any sale of said real estate you will give thirty days' public notice by publishing notice of said sale at least four weeks previous to said sale; the first publication to be at least thirty days prior to said sale, in the Wisconsin Herald, a weekly newspaper printed and published at Lancaster, in said county of Grant, W. T'y. You will also make return of this warrant and of your doings herein, on oath, to the judge of probate of Grant County aforesaid as soon as may be.

In testimony whereof, I have hereto affixed the seal of the pro-
35 bate court of Grant County, W. T'y, at Lancaster, in said Territory, this 27th day of May, A. D. 1845.

[SEAL.] H. R. COLTER,
Judge of Probate, Grant County, Wis. Territory.

Oath.

I, Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of Joe Daviess County, deceased, do solemnly that I will use my best

skill and judgment in fixing on the time and place of sale, and that I will exert my utmost endeavors to dispose of the same in such manner as will produce the greatest advantage to all persons interested therein, and that without any sinister views whatever. So help me God.

EDWIN RIPLEY,
Adm'r of Estate of M. C. Comstock.

Sworn and subscribed before me May 27, 1845.

NELSON DEWEY,
Jus. Peace of Grant Co., W. T'y.

36 This indenture, made the eighteenth day of July, in the year of our Lord one thousand eight hundred and forty-five, between Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of the county of Joe Daviess and State of Illinois, deceased, of the first part, and George C. Rice, of the county aforesaid and State of Illinois, of the second part, witnesseth, that whereas heretofore, to wit, on the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and forty-five, a warrant issued out of and under the seal of the probate court for the county of Grant and Territory of Wisconsin, directed to the said party of the first part, authorizing and empowering him, the said party of the first part, to sell so much of the real estate of the said Matthias C. Comstock, deceased, situated in said Grant County, as will be sufficient to pay the sum of eight thousand dollars of the debts of said intestate, with legal costs and charges; which said warrant is in the words and figures following, to wit:

TERRITORY OF WISCONSIN, *Grant County, ss:*

The honorable probate court in and for Grant County aforesaid to Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of Joe Daviess County, in the State of Illinois, deceased intestate:

Whereas it appears by the certificate of the probate justice in and for the county of Joe Daviess aforesaid, and by the records and files of the probate court of Grant County aforesaid, that the personal estate of said de-
37 ceased is not sufficient to pay his just debts by the sum of eight thousand dollars and the costs attending said sale:

Therefore you are hereby licensed and empowered and authorized to sell so much of the real estate of said deceased at public auction, agreeable to law, as will be sufficient to pay the sum of eight thousand dollars and all legal costs and charges attending said sale.

Before making any sale of said real estate you will give thirty days' public notice of said sale, at least four weeks previous to said sale, (the publication to be at least thirty days prior to said sale,) in the Wisconsin Herald, a weekly newspaper printed and published at Lancaster, in said county of Grant, W. T.

You will also make return of this warrant and of your doings herein, on oath, to the judge of probate of Grant County aforesaid as soon as may be.

In testimony whereof, I have hereto affixed the seal of the probate court of Grant County, W. T., at Lancaster, in said Territory, this 27th day to May, A. D. 1845.

H. R. COLTER,
Judge of Probate, Grant County, Wis. Territory.

And whereas afterwards, to wit, on the 16th day of July, A. D. 1845, between the hours of nine o'clock a. m. and four o'clock p. m. of said day, the said real estate having been duly advertised as the law directs, (a copy of

the said advertisement being hereunto annexed,) the said administrator, at a public sale, openly sold and struck off to the said George C. Rice the following described premises, for the sum of six hundred dollars, he being the highest bidder and no person having bid more for the same, which premises so sold are known and designated as the undivided half of the south
38 half of section number twenty-six (26) and the west half of the south-west quarter of section number twenty-five, (25,) township number one (1) north, range one (1) west of the fourth principal meridian, containing four hundred acres:

Now, therefore, this indenture witnesseth that the said Edwin Ripley, administrator as aforesaid, for and in consideration of the sum of six hundred dollars to him in hand paid by the said George C. Rice, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said George C. Rice, his heirs and assigns, forever, the above-described premises, with the appurtenances thereunto belonging. To have and to hold the same, with all the privileges and appurtenances, to him, the said George C. Rice, his heirs and assigns, to his and their own proper use and behoof forever.

In witness whereof, the said Edwin Ripley, administrator as aforesaid, has hereunto set his hand and seal the day and year first above written.

[SEAL] EDWIN RIPLEY,
Adm'r of Estate of M. C. Comstock, dec'd.

Signed, sealed, and delivered in the presence of—
WM. H. BRADLEY.
A. B. CAMPBELL.

STATE OF ILLINOIS, *Jo Daviess County, ss:*

I, William H. Bradley, clerk of the circuit court in and for said county, do hereby certify that Edwin Ripley, whose name appears subscribed to
39 the within and foregoing deed as administrator of the estate of Matthias C. Comstock, deceased, and who is personally known to me to be the identical person who signed the same, this day appeared before me and acknowledged that he has executed the same freely and voluntarily for the uses and purposes therein expressed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Galena, in said Jo Daviess County, this 21st day of July, A. D. 1845.

Attest: WILLIAM H. BRADLEY, *Clerk.*

Deed, Edwin Ripley, adm'r of Matthias C. Comstock, deceased, No. 2, to George C. Rice. S. ½, sec. 26, T. 1 N., R. 1 W.; W. ½ of SW. ¼, sec. 25, T. 1 N., R. 1 W.

Received for record, July 31st, 1845, at 7 of the clock a. m., and recorded in Grant County register's office, in book E of conveyances, on pages 366 and 367.

Attest: H. R. COLTER, *Register G. C., W. T.*

40 This indenture, made the eighteenth day of July, in the year of our Lord one thousand eight hundred and forty-five, between Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of the county of Jo Daviess and State of Illinois, deceased, of the first part, and Samuel Hughlett and Jefferson Crawford, of the same place, of the second part, witnesseth, that whereas heretofore, to wit, on the twenty-second day of May, in the year of our Lord one thousand eight hundred and forty-five, a warrant issued out of and under the seal of the probate court for the county

of Grant and Territory of Wisconsin, directed to the said party of the first part, authorizing and empowering him, the said party of the first part, to sell so much of the real estate of the said Matthias C. Comstock, deceased, situate in the said county of Grant, as will be sufficient to pay the sum of eight thousand dollars of the debts of said intestate, with legal costs and charges, which said warrant is in the words and figures following, to wit:

TERRITORY OF WISCONSIN, *Grant County, ss:*

The honorable probate court in and for Grant County aforesaid to Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of Jo Daviess County, in the State of Illinois, intestate.

Whereas it appears by the certificate of the probate justice in and for the county of Jo Daviess aforesaid, and by the records and files of the probate court of Grant County aforesaid, that the personal estate of said deceased is not sufficient to pay his just debts by the sum of eight thousand dollars and costs attending the sale:

41 Therefore you are hereby licensed and empowered and authorized to sell so much of the real estate of said deceased at public auction, agreeable to law, as will be sufficient to pay the sum of eight thousand dollars and all legal costs and charges attending said sale.

Before making any sale of said real estate you will give thirty days' public notice by publishing notice of said sale at least four weeks previous to said sale, (the first publication to be at least thirty days prior to said sale,) in the Wisconsin Herald, a weekly newspaper printed and published at Lancaster, in said county of Grant, W. T'y.

You will also make return of this warrant and of your doings herein, on oath, to the judge of probate of Grant County aforesaid as soon as may be.

In testimony whereof, I have hereto affixed the seal of the probate court of Grant County, W. T'y, at Lancaster, in said Territory, this 27th day of May, A. D. 1845.

[SEAL.] H. R. COLTER,
Judge of Probate, Grant County, Wis. Territory.

And whereas afterwards, to wit, on the 16th day of July, A. D. 1845, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon of said day, the said real estate having been duly advertised as the law directs, (a copy of which said advertisement is hereunto annexed,) the said administrator, at a public sale, openly sold and struck off to the said Samuel Hughlett and Jefferson Crawford the following described premises, for the sum of five hundred dollars, they being the highest bidders, and no person having bid more for the same, which premises so sold are known and designated on the plat of the United States survey as being the

42 undivided half of the west half of the northwest quarter, and the northwest quarter of the southwest quarter of section thirty-six, (36;) also the northeast quarter and the north half and the southwest quarter of the southeast quarter of section thirty-five, (35,) all in township number one (1) north, range number one (1) west of the fourth principal meridian, containing four hundred acres:

Now, therefore, this indenture witnesseth that the said Edwin Ripley, administrator as aforesaid, for and in consideration of the sum of five hundred dollars to him in hand paid by the said Samuel Hughlett and Jefferson Crawford, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said Samuel Hughlett and Jefferson Crawford, their heirs and as-

signs, forever, the above-described premises, with the appurtenances thereto belonging. To have and to hold the same, with all the privileges and appurtenances, to them, the said Hughlett and Crawford, their heirs and assigns, to their own use, benefit, and behoof forever.

In witness whereof, the said Edwin Ripley, administrator as aforesaid, has hereunto set his hand and seal the day and year first above written.

[SEAL.] EDWIN RIPLEY,
Adm'r of Estate of M. C. Comstock, dec'd.

Signed, sealed, and delivered in presence of—
WM. H. BRADLEY.
W. P. MILLARD.

43 STATE OF ILLINOIS, *Jo Daviess County, ss:*

I, William H. Bradley, clerk of the circuit court in and for said county, do hereby certify that Edwin Ripley, administrator of the estate of Matthias C. Comstock, deceased, whose name appears subscribed to the within and foregoing deed, and who is personally known to me to be the identical person who signed the same, this day appeared before me and acknowledged that he had executed the same freely and voluntarily for the uses and purposes therein expressed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Galena, this twenty-third day of July, A. D. 1845.

Attest: WILLIAM H. BRADLEY, *Clerk.*

Deed, Edwin Ripley, adm'r of M. C. Comstock, dec'd, No. 1, to Hughlett & Crawford. W. ½ NW. ¼ and NW. ¼ of SW. ¼, sec. 36, and NE. ¼ and N. ½ of SE. ¼, SW. ¼ of SE. ¼, sec. 35, T. 1, R. 1 W.

Received for record, July 31, 1845, at 7 of the clock a. m., and recorded in Grant County register's office, in Book E of conveyances, on pages 368 and 369.

Attest: H. R. COLTER, *Register G. C., W. T.*

44 This indenture, made this 30th day of September, in the year of our Lord one thousand eight hundred and forty-eight, between Edwin Ripley, administrator of the estate of Matthias C. Comstock, deceased, late of Jo Daviess County and State of Illinois, of the first part, and Jefferson Crawford, of Grant County, Wisconsin, of the second part, witnesseth, that whereas heretofore, to wit, on the 27th day of May, in the year of our Lord eighteen hundred and forty-five, a warrant issued out of and under the seal of the probate court in and for the county of Grant and Territory of Wisconsin, directed to the said Edwin Ripley, administrator aforesaid, authorizing and empowering him, the said party of the first part, to sell so much of the real estate of said deceased as will be sufficient to pay the sum of eight thousand dollars, and the costs attending said sale, which said warrant is in the words and figures following, to wit:

TERRITORY OF WISCONSIN, *Grant County, ss:*

The honorable probate court in and for Grant County aforesaid to Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of Jo Daviess county, Illinois, deceased intestate.

Whereas, as appears by the certificate of the judge of probate of Jo Daviess County aforesaid, and from the record and files of the probate court of Grant County aforesaid, that the personal estate of said deceased is not sufficient to pay his just debts by the sum of eight thousand dollars, therefore you are hereby licensed and empowered and authorized to sell so much of the real estate of said deceased, situate in the county of Grant aforesaid, at

public auction, agreeable to law, as will pay eight thousand dollars and the legal costs and charges attending said sale. Before making any sale of said real estate you will give at least thirty days' public notice by publishing notice of said sale at least four weeks previous to said sale, the first notice of said sale to be published at least thirty days prior to said sale in the Wisconsin Herald, a weekly newspaper printed and published at Lancaster, in said Territory. You will also make return of this warrant and of your doings herein, on oath, to the judge of probate of Grant County aforesaid as soon as may be.

In testimony whereof, I have hereunto set my hand and affixed the seal of the probate court of Grant County, at Lancaster, in said Wisconsin Territory, this 27th day of May, A. D. 1845.

[SEAL.] H. R. COLTER,
Judge of Probate in and for Grant County, Wisconsin Territory.

And whereas afterwards, to wit, on the tenth day of September, A. D. 1848, between the hours of ten o'clock in the forenoon and five o'clock in the afternoon of said day, the said premises having been duly advertised as the law directs, and according to the injunction of the above warrant from the probate court of Grant County aforesaid, the said Edwin Ripley, administrator as aforesaid, openly sold and struck off to the said Jefferson Crawford the above-described premises for the sum of two hundred and forty dollars, he being the highest bidder, and no person having bid more for the same, which said premises so sold are known and designated upon the plat of the United States survey or the east half of the southwest quarter of section thirty-five, (35,) township one, (1,) range one (1) west of the fourth principal meridian, in Grant County aforesaid, containing eighty acres, (80,) more or less. Now, therefore, the said Edwin Ripley, administrator
46 as aforesaid, for and in consideration of the sum of two hundred and forty dollars to him in hand paid by the said Jefferson Crawford, the receipt whereof is hereby acknowledged, hath granted, bargained, and sold, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said Jefferson Crawford, his heirs and assigns, forever, the above-described premises, with the appurtenances thereunto belonging. To have and to hold the same, with all the privileges and appurtenances, to him, the said Jefferson Crawford, his heirs and assigns, for his and their own proper use and benefit and behoof forever.

In testimony whereof, the said Edwin Ripley, administrator as aforesaid, hath hereunto set his hand and seal the day and year first above written.

EDWIN RIPLEY. [SEAL.]
Adm'r of Estate of M. C. Comstock, dec'd.

Signed, sealed, and delivered in presence of—
WM. H. BRADLEY.
WM. WEIGLEY.

STATE OF ILLINOIS, *Jo Daviess County, ss:*

I, William H. Bradley, clerk of the circuit court in and for Jo Daviess County aforesaid, hereby certify that Edwin Ripley, administrator of the estate of Matthias C. Comstock, deceased, late of Jo Daviess County, Illinois, whose name appears to the foregoing deed and who is personally known to me to be the identical person who signed the same, this day appeared before me and acknowledged that he had executed the same fairly and vol-
47 untarily for the uses and purposes therein expressed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Galena, this fourth day of October, A. D. 1848.

[SEAL.] Attest: WM. H. BRADLEY, *Clerk.*

Deed, Edwin Ripley, administrator of Matthias C. Comstock, deceased, No. 4, to Jefferson Crawford. E. ½ of SW. ¼, sec. 35, T. 1 N., R. 1 W.

REGISTER'S OFFICE, *Grant Co., Wisconsin.*

Received for record, Nov. 29th, 1848, at 8 o'clock a. m., and recorded in book N of conveyances, on pages 122 and 123.

Attest: M. W. MARTIN, *Register G. C.*

48 To these the plaintiffs objected, because—

1. It appears on the face thereof that the probate court of Iowa County had no jurisdiction to appoint an administrator of the estate of Matthias Calvin Comstock, for at the time of his decease he was not a resident of or an inhabitant of the Territory of Wisconsin, and had no widow, next of kin, or creditor residing therein. It does not appear that decedent had goods, rights, chattels, and credits in the county of Iowa.

2. The probate court of Iowa County had no power to accept the resignation of Charles Comstock, administrator, and to appoint Edwin Ripley administrator de bonis non.

4. It appears that Edwin Ripley at the time of his appointment resided out of the Territory of Wisconsin, but it does not appear that there was personal estate of the deceased to the amount of $15 or upwards, or debts of the like or greater value due from the deceased estate unpaid at the time of his appointment.

5. The application and order for license is informal, insufficient, and irregular. It does not appear to be for the payment of the debts of M. C. Comstock which he owed at the time of his death. It does not appear to whom the debts were owing, or that any debts had been established. The order of
49 publication is not in compliance with the statute; no facts appear to authorize a publication. The license does not appear of record. It does not appear that notice of the time and place of sale or sales has been given, or that any sale or sales were ever made under the license. The deeds and the recitals therein are not adequate proof of the sales or the facts recited. The deeds show that part of the premises were sold in 1845 and part in 1848. The license authorizes but one sale.

Each, every, and all of which objections the court overruled.

To which ruling and decision the plaintiffs then and there excepted.

And the said record, license, and deeds were then read in evidence.

The defendant then called Edwin Ripley, who, being duly sworn, did depose and say:

Question. What personal property, if any, did Matthias Calvin Comstock have in Iowa County when you were appointed administrator in 1840?

(To which the plaintiffs then and there objected as incompetent, immaterial, and irrelevant. The court overruled the objection; to which the plaintiffs then and there excepted.)

Ans. There were horses, wagons, &c., in Iowa County of the value of $100, and claims for mineral due in Grant County.

The defendant then introduced copies of the Wisconsin Herald, a weekly newspaper published in the County of Grant, containing notices of sale, subject to plaintiffs' exception, but offered no record proof of notice, sale,
50 nor proof of posting notices thereof; and the defendant offered parol testimony to prove that the license was issued to and retained by Edwin Ripley, and the court admitted said evidence, subject to plaintiffs' exception.

The license is set forth herein.

The plaintiff then produced the following from the probate records of Grant County, to wit:

51 In the matter of the estate of Matthias C. Comstock, deceased.

To the hon. the judge of the county court within and for the county of Grant and State of Wisconsin:

The petition of Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of the county of Jo Davies and State of Illinois, respectfully represents and shows unto your honor that the said Matthias C. Comstock departed this life on or about the 10th day of November, in the year of our Lord one thousand eight hundred and thirty-eight, intestate, and the owner of a considerable amount of property, both real and personal, situated in said county of Jo Davies and State of Illinois, and seized and possessed in fee simple of a large amount of lands and real estate in the county of Grant and State of Wisconsin; that the said Matthias C. Comstock was at the time of his decease largely indebted beyond the value of the personal property then owned by him; that your petitioner was appointed by the probate court within and for said county of Jo Daviess and State of Illinois, administrator de bonis non of the estate of the said Matthias C. Comstock on or about the 20th day of November, A. D. 1839, and immediately took upon himself the business of said administration; and thereupon sold and disposed of, according to law, all the personal property of said estate which came into his hands to be administered, and all the lands and real estate situated in the county of Jo Daviess and State of Illinois aforesaid, and faithfully applied the proceeds of said sales to the payment of the debts of said estate, and after exhausting the proceeds of said in the said county of Jo Daviess your petitioner did, in the further payment of the debts of said estate and for the complete discharge of the same in said county of Jo Daviess, pay the sum of twelve thousand dollars ($12,000) and upwards on and above the

52 receipts of your petitioner from said estate in the said county of Jo Daviess, which said sum of twelve thousand dollars and upwards was *was*, upon final settlement of said estate by your petitioner before the probate court of said county of Jo Daviess, allowed to your petitioner as a just claim against said estate, as will appear by reference to the certificate of said allowance under the hand of the clerk of said court and the seal of said court, herewith presented.

Your petitioner further states that he has paid taxes upon the lands of said estate in the State of Wisconsin the further sum of five thousand dollars, (5,000,) and that said estate is indebted to him for services rendered by him in the care and management of said estate in the State of Wisconsin, and for money paid by him for services rendered by others in the case of said estate; and that there is no personal property of any kind or description belonging to said estate wherewith to pay any portion of said indebtedness.

Your petitioner further states that the said Matthias C. Comstock at the time of his decease was seized and possessed in fee simple of the following described lands and real estate, situate, lying, and being in the county of Grant and State of Wisconsin, to wit, the undivided one half of all the following named tracts or parcels of land:

53 The S. ½ and NW. ¼ and W. ½ of NE. ¼ of sec. No. 1, township No. 1 N., R. No. 1 W., of the value of about $800. Sec. No. 11 and sec. No. 12 in township and range aforesaid, of the value of about $2,000. The N. ½ and the E. ½ of SE. ¼ of sec. No. 13, and the N. ½ and the W. ½ of SW. ¼ of sec. No. 14, in said township No. 1 N., R. No. 1 W., of the value of about $1,200; sections No. 15 and 23, in the same township and range, of the value of about $2,000; the SW. ¼ and SW. ¼ of NW. ¼ of sec. No. 24, the W. ½ of NW. ¼ and the W. ½ of SW. ¼ of sec. No. 25, and the W. ½ and the SE. ¼ and W. ½ of NE. ¼ of sec. No. 26, all in said township No. 1 W., R. No. 1 W., of the value of about $800; sections No. 34 and 35, in said

township and range, of the value of about $2,000; the W. ½ of the NW. ¼, the W. ½ of the SW. ¼, and the E. ½ of SE. ¼, of section No. 36, township No. 1 N., R. No. 1 W., of the value of about $400; the W. ½ and NE. ¼ and the W. ½ of SE. ¼, of section No. 36, township No. 2 N., R. No. 1 W., of the value of about $900; all of which lands above described are situated and lie in the county of Grant and State of Wisconsin aforesaid.

And your petitioner, the premises considered, that he, as administrator of the estate of the said Matthias C. Comstock, deceased, may be authorized, licenced, and empowered by the honorable court to sell and dispose of all said lands above described, or so much thereof as shall be necessary for the purpose of paying the debts of said estate and the claims of your
54 petitioner as above set forth. And your petitioner will ever pray, &c.

EDWIN RIPLEY,
Administrator of the Estate of Matthias C. Comstock, deceased.

STATE OF ILLINOIS, *County of Jo Daviess, ss:*

Edwin Ripley, being first duly sworn according to law, deposes and says that the foregoing petition for the sale of real estate by him subscribed has been read to him, and that he knows the contents, and that the facts therein set forth upon his own personal knowledge are true, and that as to the rest he believes them to be true.

EDWIN RIPLEY.

Subscribed and sworn to before me this 12th day of June, 1856.
BENJ. O'CONNOR, *Justice of the Peace.*

STATE OF ILLINOIS, *Jo Daviess County, ss:*

I, Richard Seal, clerk of the county court within and for said county and State, do hereby certify that Benj. O'Connor, esq., whose name is subscribed to the jurat of the foregoing affidavit, was, at the time of subscribing, the the same, and now is, an acting justice of the peace within and for the county of Jo Daviess and State of Illinois duly commissioned and sworn, and as such justice of the peace was and is duly authorized to administer oaths by the laws of the State of Illinois; and do further certify that I am well
55 acquainted with the said Benj. O'Connor and do verily believe that his signature to the said jurat attached is genuine.

In witness whereof, I have hereunto set my hand and affixed the seal of court, at my office, in the city of Galena, in said county, this 13th day of June, 1856.

[L. S.] Attest: RICHARD SEAL, *Clerk.*

56 STATE OF ILLINOIS, *County of Jo Daviess:*

In the matter of the estate of Matthias C. Comstock, deceased.

I, Richard Seal, clerk of the county court within and for said county and State, do hereby certify that at the March term of said county court of Jo Daviess County, sitting as a court of probate, Edwin Ripley, administrator de bonis non of the estate of Matthias C. Comstock, deceased, made a final settlement of said estate before said court, and on such final settlement said estate was found to be indebted to said Edwin Ripley in the sum of twelve thousand one hundred and seventy-six 62-100 dollars, and the same was allowed to said Edwin Ripley as a claim against said estate by said court, and ordered to be paid out of any effects of said estate which might thereafter come into the hands of the administrator.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in the city of Galena, in said county, this 13th day of June, A. D. 1856.

[L. S.] Attest: RICHARD SEAL, *Clerk.*

57 In county court, sitting as a court of probate, at the regular term of said court, on the 5th day of March, 1856, the following order appears of record, to wit:

Adm. report.

STATE OF ILLINOIS, *Jo Daviess County:*

In the matter of the estate of Matthias C. Comstock, deceased.

In this case of the report of Edwin Ripley, administrator de bonis non of said estate, having been filed in the court at the last February term thereof, and a conditional order of confirmation having been entered upon the records of this court in respect to the same, and no person appearing to show cause why said conditional order of confirmation should not be made absolute, and said court being satisfied upon examination of said report, and of the proofs presented in support of the same, that the matters therein stated are correct and honest, it is therefore ordered, adjudged, and decreed by the court that said report be, and the same is hereby, approved and confirmed in all respects, and the clerk is hereby ordered to make up the account of said administrator de bonis non in accordance with the statements of said report. And it is further ordered, adjudged, and decreed that the said administrator be allowed, and he hereby is allowed, the full amount of his claim against said estate, to wit, the sum of twelve thousand one hundred and seventy-six 63-100 dollars, to be paid to him out of the assets of said estate which may come into his hands.

STATE OF ILLINOIS, *Jo Daviess County, ss:*

I, Richard Seal, clerk of the county court in and for said county, &c., do hereby certify that the foregoing is a true and correct copy of the records of said court, at the March term of said court, to wit, on the 5th day of March, 1856, in the matter of the report of the administrator de bonus

58 non of the estate of Matthias C. Comstock, deceased, as the same appears of record in my office.

In testimony whereof, I have hereunto set my affixed the seal of said court, at Galena, this 8th day of July, A. D. 1856.

[L. S.] Attest: RICHARD SEAL, *Clerk.*

59 *Petition for license to sell real estate in probate court.*

STATE OF WISCONSIN, *County of Grant, ss:*

In the matter of the estate of M. C. Comstock, deceased.

COUNTY COURT, *June 14th*, 1856.

Present: Stephen O. Pain, judge.

On this day was filed in this court the petition of Edwin Ripley, administrator de bonis non of the estate of said deceased, for license to sell certain real estate of said deceased, particularly described in said petition, in order to raise means to pay the debts allowed against the estate of said deceased on the expense of administration. And thereupon it is ordered that the matters of said petition be heard before the judge of this court, at the court-house, in Lancaster, in said county, on the first Mon-

day of August, A. D. 1856, and that notice thereof be given to all persons concerned by publishing this order for four successive weeks previous to said day of hearing in the Grant County Herald, a weekly newspaper published in said Lancaster.

June 14th, 1856.

STEPHEN O. PAINE, *County Judge.*

Proof of publication.

STATE OF WISCONSIN, *County of Grant, ss:*

LANCASTER, *July 14th*, 1856.

I, Joseph C. Caver, the editor of, and one of the publishers of, the
60 Grant County Herald, a weekly newspaper printed and published at Lancaster, Grant County, Wisconsin, do solemnly swear that the annexed notice has been published four weeks successively in said newspaper, commencing in No. 52 of vol. 7 of said paper, published on the 21st day of June, A. D. 1856, and ending with No. 3 of vol. 8, published on the 12th day of July, A. D. 1856.

JOSEPH C. COVER.

Subscribed and sworn to this day of , A. D. 1856, before me.

JOHN G. CLARK,
Clerk Circuit Court, Grant County, Wis.

Printer's fees, 4 insertions, 2 folios	$2 00
Certificate	25
	2 25

Record of order of sale of real estate.

STATE OF WISCONSIN, *County of Grant, ss:*

Grant County court, in probate, August term, August 4.

In the matter of the estate of M. C. Comstock, deceased.

Present: Stephen O. Paine, judge.

Pursuant to an order of this court, made in said matter on the 14th day of June, A. D. 1856, the petition of Edwin Ripley, administrator of said estate, praying for license to sell all the real estate of said deceased in said county of Grant, was this day heard and considered, and the affidavit of Joseph C. Cover showing that the notices required to be given by said order has been duly published as ordered, being filed and satis-
61 factorily appearing to the court now here from said petition (no adverse appearance or objection being made) that a sale of said real estate is necessary for the payment of valid claims against said deceased and the charges of administration, it is ordered that the said administrator be, and he hereby is, licensed, authorized, and fully empowered to sell the following described lands, to wit: The south half and the northwest qr. and west half of the northeast quarter of section No. one, in township No. one north, of range No. one west; sections Nos. eleven and twelve, in the said township; the north half and the east half, the southeast quarter of section No. thirteen, and the north half and west half of the southwest quarter of section no fourteen, in the same township; the southwest quarter and the S. west quarter of northwest quarter of section No. twenty-five; the west half of the northwest quarter and the west half the southwest quarter of section

No. twenty-five, and the west half, and the southeast quarter and west half of northeast quarter of section twenty-six, in the same township; sections Nos. thirty-four and thirty-five, in the same township; the west half of the northwest quarter, and the west half of the southwest quarter, and the east half of the southeast quarter of section No. thirty-six, all in the same township; the west half and the northeast quarter and the west half of the
62 southeast quarter of section No. thirty-six, in township No. 2 north, of range No. 1 west, all of said lands being situated in the county of Grant and State of Wisconsin.

And it is further ordered that before making sale of said real estate, or any part thereof, the said administrator take and subscribe on oath as required by statute in such case. The bond of the said administrator heretofore filed by him being deemed amply sufficient, no other or further bond is required, and the said administrator is also required to cause notice of the time, place, and terms of said sale to be posted up in three of the most public places, in the towns respectively in which said lands lie, three weeks at least previous to said sale, and that he cause like notice of such sale to be published for three weeks previous to said sale in the Grant County Herald, a weekly newspaper published in the town of Lancaster, in said county, and that said sales be held in the county in which said lands are situated, at public vendue, between the hours of nine o'clock in the forenoon and the setting of the sun, and that immediately upon accomplishing a sale of said lands, or any part thereof, he report the same to this court, together with proofs of having given the notices required by this order.

STEPHEN O. PAINE, *County Judge.*

63 *Administrator's report of sale of lands.*

STATE OF WISCONSIN, *County of Grant:*

In probate in the county court of said county.

In the matter of the estate of Matthias C. Comstock, deceased.

To the honorable the county court within and for the county of Grant, in the State of Wisconsin:

I, Edwin Ripley, administrator of the estate of Matthias C. Comstock, late of Jo Daviess County, Illinois, deceased, do respectfully submit to your honor the following report of the sales of lands belonging to said estate, lying in the county of Grant aforesaid, under and by virtue of an order of sale made by your honorable court at the August term, A. D. 1856.

In obedience to said order I gave the notice required by law, and the terms of the order, appointing the fifth day of December, A. D. 1856, at one o'clock p. m., at the Empire House, in the village of Hazel Green, in the said county of Grant, to sell the lands described in said order, I offered at public sale at the time and place fixed by the notices, for cash, all the lands described in said license of said county court.

And I do further report that all the lands described in said order, and which were advertised for sale, and which were then and there offered for sale, were sold to the following persons for the following prices:

64 I first offered the undivided half of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of sec. 36; also the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ and SW. $\frac{1}{4}$ of sec. 35, in township 1 north, range 1 west, for which Samuel Hughlett and Jefferson Crawford bid the sum of $2 50 an acre, which being the highest and best bid therefor was struck off and sold to them for $500.

I then offered the undivided half of the S. ½ of section 26, and the W. ½ of SW. of sec. 25, which was struck off and sold to Jefferson Crawford, he being the highest and best bidder therefor, for the sum of six hundred dollars, ($600.)

I then offered the undivided half of the west half of the north W. ¼ of sec. 25, which was struck off and sold to John Edwards, he being the highest and best bidder therefor, for the sum of one hundred and sixty dollars, ($160.)

I then offered the undivided half of the east half of the NE. ¼ of sec. 23, which was struck off and sold to Alfred K. Johnson, he being the highest and best bidder therefor, for the sum of two hundred dollars, ($200.)

I then offered the undivided half of the east ½ of SE. ¼ of 36, town and range aforesaid, which was struck off and sold to Alfred K. Johnson, he being the highest and best bidder therefor, for the sum of two hun-
65 dred dollars, ($200.)

I then offered the undivided half of the SW. ¼ of the SE. ¼ of sec. 36 and the SE. ¼ of SW. ¼ of sec. 35, town and range aforesaid, which were struck off and sold to Nathan Austin, he being the highest and best bidder therefor, for the sum of one hundred dollars, ($100.)

I then offered the undivided half of the N. ½ of SW. ¼ and SW. ¼ of NW. ¼ of sec. 24, which was struck off and sold to Abegail Curtis, she being the highest and best bidder therefor, for the sum of two hundred and forty dollars, ($240.)

I then offered the undivided half of the S. ½ and NE. ¼ of sec. 12, town and range aforesaid, which was struck off and sold to Alfred K. Johnson, he being the highest and best bidder therefor, for the sum of seven hundred and twenty dollars, ($720.)

I then offered the undivided half of the S. ½ of the SE. ¼ of sec. 23, town and range aforesaid, which was struck off and sold to Alfred K. Johnson, he being the highest and best bidder therefor, for the sum of one hundred and sixty dollars, ($160.)

I then offered the undivided half of the W. ½ of NE. ¼ of sec. 23, same town and range, which was struck off and sold to Benj. and Richard
66 Straw, they being the highest and best bidders therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered the undivided half of the E. ½ of NW. ¼ of sec. 23, same town and range, which was struck off and sold to James Mitchell, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered for sale the undivided half of the N. ½ of SE. ¼ of sec. 23, same town and range, which was struck off and sold to Alfred K. Johnson, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered the undivided half of the NE. ¼ of SE. ¼ and the W. ½ of SE. ¼ of sec. 1, same town and range, which was struck off and sold to Alfred K. Johnson, he being the highest and best bidder therefor, for the sum of one hundred and eighty dollars, ($180.)

I then offered the undivided half of the NE. ¼ of sec. 14, same town and range, which was struck off and sold to J . Alton, he being the highest and best bidder therefor, for the sum of two hundred and forty dollars, ($240.)

I then offered the undivided half of the W. ½ of NE. ¼ and NW. ¼ of sec. 13, town and range aforesaid, which was struck off and sold to Augustus
67 Tyler, he being the highest and best bidder therefor, for the sum of seven hundred and twenty dollars, ($720.)

I then offered the undivided half of the E. ½ of SW. ¼ of sec. 23, T. and R. aforesaid, which was struck off and sold to Norman Sherman, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered the undivided half of the E. ½ of SW. ¼ of sec. 35, T. and R. aforesaid, which was struck off and sold to Jefferson Crawford, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered the undivided half of the E. ½ of the NW. ¼ of sec. 14, t'p and R. aforesaid, which was struck off and sold to Henry Stevens, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered the undivided half of the W. ½ of the SW. ¼ of sec. 14, t'p and R aforesaid, which was struck off and sold to Enoch Robinson, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered the undivided ½ of the W. ½ of the NE. ¼ of sec. 1, t'p and R. aforesaid, which was struck off and sold to Henry Pascho, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered the undivided ½ of the E. ½ of SE. ¼ of sec. 13, t'p and
68 R. aforesaid, which was struck off and sold to Thomas Stevens, he being the highest and best bidder therefor, for the sum of two hundred dollars, ($200.)

I then offered the undivided half of the SE. ¼ of NE. ¼ of sec. 36, township 2 N., of range 1 W., which was struck off and sold to Alfred K. Johnson, he being the highest and best bidder therefor, for the sum of fifty dollars, ($50.)

I then offered the undivided half of the SW. ¼ of SE. ¼ of sec. 1, t'p and and R. first aforesaid, which was struck off and sold to John Edwards, he being the highest and best bidder therefor, for the sum of sixty dollars, ($60.)

I then offered the undivided half of the W. ½ of SW. ¼ of sec. 23, t'p and and R. first aforesaid, which was struck off and sold to Norman Sherman, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered the undivided half of the W. ½ of the NW. ¼ of sec. 14, t'p and R. first aforesaid, which was struck off and sold to Edward Rodgers, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered the undivided half of the W. ½ of the NE. ¼ of sec. 36, township 2 north, range 1 west, which was struck off and sold to Alfred
69 K. Johnson, be being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120.)

I then offered the undivided half of the W. ½ of the NW. ¼ of sec. 23, t'p 1, R. 1 W., which was struck off and sold to Benjamin and Richard Straw, for the sum of one hundred and twenty dollars, ($120 00.)

I then offered the undivided half of the southwest quarter of the SE. ¼ of sec. 36, t'p 2 N., R. 1 W., which was struck off and sold to Alfred K. Johnson, he being the highest and best bidder therefor, for the sum of sixty dollars, ($60 00.)

I then offered the undivided half of the W. ½ of the NW. ¼ of sec. 35, t'p 1 W., which was struck off and sold to Frederick Hessick, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120 00.)

I then offered the undivided half of the SE. ¼ of sec. 11, township and range last aforesaid, which was struck off and sold to Charles Harris, he

being the highest and best bidder therefor, for the sum of two hundred and twenty-five dollars, ($225 00.)

I then offered the undivided half of the S. ½ of the NW. ¼, and S. ½ of NE. ¼, and N. ½ of SW. ¼ of sec. 11, t'p and R. last aforesaid, which was struck off and sold to Frederick Dobson, he being the highest and best bidder
70 therefor, for the sum of three hundred and sixty dollars, ($360 00.)

I then offered the undivided half of the SE. ¼ of section 12, t'p and R. last aforesaid, which was struck off and sold to John Edwards, he being the highest and best bidder therefor, for the sum of two hundred and forty dollars, ($240 00.)

I then offered the undivided half of the E. ½ of the NE. ¼ of sec. 13, t'p and R. last aforesaid, which was struck off and sold to John Grey, jr., he being the highest and best bidder therefor, for the sum of two hundred dollars, ($200 00.)

I then offered the undivided half of the S. ½ of the SW. ¼ of sec. 24, t'p and R. last aforesaid, which was struck off and sold to Alfred K. Johnson, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120 00.)

I then offered the undivided half of the W. ½ of the NE. ¼ and NW. ¼ of sec. 26, t'p and R. last aforesaid, which was struck off and sold to John Edwards, he being the highest and best bidder therefor, for the sum of three hundred and sixty dollars, ($360 00.)

I then offered the undivided half of the S. ½ of the SW. ¼ of sec. 1, t'p and R. last aforesaid, which was struck off and sold *struck off and sold* to James Bordow, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120 00.)

71 I then offered the undivided half of sec. 34, t'p and R. last aforesaid, which was struck off and sold to John Edwards, he being the highest and best bidder therefor, for the sum of seven hundred dollars, ($700 00.)

I then offered the undivided half of the E. ½ of the NE. ¼ of sec. 15, t'p and R. last aforesaid, which was struck off and sold to Henry Michell, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120 00.)

I then offered the undivided half the NW. ¼ of the SE. ¼, and the NE. ¼ of the SW. ¼ of sec. 15, t'p and R. last aforesaid, which was struck off and sold to John N. Collins, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120 00.)

I then offered the undivided half of the north E. ¼, of the NE. ¼ of sec. 36, township 2 N., range 1 W., which was struck off and sold to John Stevens, he being the highest and best bidder therefor, for the sum of sixty dollars, ($60 00.)

I then offered the undivided half of the E. ½ of the NW. ¼ of sec. 35, township 1 N., R. 1 W., which was struck off and sold to Nathan Austin, he being the highest and best bidder therefor, for the sum of one hun-
72 dred dollars, ($100 00.)

I then offered the undivided half of the W. ½ of the SW. ¼ of sec. 35, t'p and R. last aforesaid, which was struck off and sold to Nathan Austen, he being the highest and best bidder therefor, for the sum of one hundred dollars, ($100 00.)

I then offered the undivided half of the W. ½ of NE. ¼ of sec. 11, t'p and R. last aforesaid, which was struck off and sold to Hugh Hawkins, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120 00.)

I then offered the undivided half of the SW. ¼ of the NE. ¼ of sec. 15, t'p and R. last aforesaid, which was struck off and sold to Richard Scuddon, he

being the highest and best bidder therefor, for the sum of sixty dollars, ($60 00.)

I then offered the undivided half of the S. ½ of the SE. ¼ of sec. 15, t'p and R. last aforesaid, which was struck off and sold to Thomas J. Rodder, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120 00.)

I then offered the undivided half of the S. ½ of NW. ¼ and NW. ¼ of SW. ¼ of sec. 15, t'p and R. last aforesaid, which was struck off and sold to Frederick Scott, he being the highest and best bidder therefor, for the
73 sum of one hundred and eighty dollars, ($180 00.)

I then offered the undivided half of the NW. ¼ of NE. ¼ of sec. 15, t'p and R. last aforesaid, which was struck off and sold to Richard Scadden, he being the highest and best bidder therefor, for the sum of fifty dollars, ($50 00.)

I then offered the undivided half of the southwest ¼ of SW. ¼ of sec. 11, t'p and R. last aforesaid, which was struck off and sold to William Suicock, he being the highest and best bidder therefor, for the sum of fifty dollars, ($50 00.)

I then offered the undivided half of the SE. ¼ of the SW. ¼ of sec. 11, t'p and R. last aforesaid, which was struck off and sold to Henry Michell, he being the highest and best bidder therefor, for the sum of fifty dollars, ($50 00.)

I then offered the undivided half of the NE. ¼ of the SE ¼ of sec. 15, t'p and R. last aforesaid, which was struck off and sold to Paul Michell, he being the highest and best bidder therefor, for the sum of fifty dollars, ($50 00.)

I then offered the undivided half of the S. ½ of SW. ¼ of sec. 15, t'p and R. last aforesaid, which was struck off and sold to William Mitchell, he being the highest and best bidder therefor, for the sum of one hun-
74 dred dollars, ($100 00.)

I then offered the undivided half of the E. ½ of NW. ¼ of sec. 1, t'p and R. aforesaid, which was struck off and sold to Enoch Robinson, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120 00.)

I then offered the undivided half of the W. ½ of NW. ¼ of sec. 1, t'p 1 N., R. 1 W., which was struck off and sold to Alfred K Johnson, he being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120 00.)

I then offered the undivided half of the N. ½ of NW. ¼ of sec. 15, t'p and R. last aforesaid, which was struck off and sold to William Michell, he being the highest and best bidder therefor, for the sum of one hundred dollars, ($100 00.)

I then offered the undivided half of the N. ½ of NW. ¼ of sec. 11, t'p and R. aforesaid, which was struck off and sold to Edward Williams, who was the highest and best bidder therefor, for the sum of one hundred dollars, ($100 00.)

I then offered the undivided half of the NW. ¼ of the SE. ¼ of sec. 36, township 2 N., R. 1 W., which was struck off and sold to James Reed,
75 he being the highest and best bidder therefor, for the sum of sixty dollars, ($60 00.)

I then offered the undivided half of the W. ½ of section 36, township No. 2 N., of R. 1 W., which was struck off and sold to James Reed, he being the highest and best bidder therefor, for the sum of four hundred and eighty dollars, ($480 00.)

I then offered the undivided half of the N. ½ of SW. ¼ of sec. 1, township 1 N., of range 1 west, which was struck off and sold to Nathan Austin, he

being the highest and best bidder therefor, for the sum of one hundred and twenty dollars, ($120 00.)

I do further report that I took and subscribed the oath required by law and the terms of said order, which is hereto attached, duly certified, and prayed to be taken as part of this report. And I do further report that I have executed and delivered deeds of the lands so sold as aforesaid to the respective purchasers thereof in my said capacity as administrator.

And I do further report and submit to this honorable court the proof of having given the notices according to law, to wit, the certificate of publication in the Grant County Herald, and the affidavit of E. D. Lowry, who posted the notices in the towns where the lands lie, which said certificate and affidavit are hereto attached, and prayed to be taken as part of this report.

And having fully reported, I further ask of this honorable court that this my report may in all respects be accepted and confirmed.

76 Galena, Dec. 20th, 1856.

EDWIN RIPLEY,
Administrator of Estate of Mathias C. Comstock.

STATE OF ILLINOIS, *Jo Daviess County, ss:*

Edwin Ripley, administrator of the estate of Matthias C. Comstock, deceased, being first duly sworn, deposes and says that the facts set forth in the foregoing report of sale of lands are true and correct.

Sworn to and subscribed before me this 22d day of December, 1856, and the seal of the county court attached.

Attest: RICHARD SEAL, *Clerk of the County Court,*
[SEAL.] *Jo Daviess County, Illinois.*

THE STATE OF ILLINOIS, *County of Jo Daviess, ss:*

This day personally appeared before the undersigned, a justice of the peace within and for said county and State, Edwin Ripley, administrator of the estate of Matthias C. Comstock, deceased, who, being first duly sworn according to law, on his oath, says that in disposing of the real estate of said intestate, which he as administrator is by the order of the county court of Grant County, Wisconsin, at the August term, A. D. 1856, thereof licensed to sell, he will exert his best endeavors to dispose of the same in such manner as will be most for the advantage of all persons interested.

77 EDWIN RIPLEY, *Administrator of Estate of M. C. Comstock.*

Subscribed and sworn to before me this 16th day of September, A. D. 1856.

BENJ. COOMBE, *J. P.*

THE STATE OF ILLINOIS, *County of Jo Daviess, ss:*

I, Richard Seal, clerk of the county court within and for said county and State, do hereby certify that Benjamin Coombe, esqr., before whom the above and foregoing affidavit was subscribed and sworn to, is now and was at the date of said affidavit an acting justice of the peace within and for said county and State, duly elected and qualified, and that as such justice of the peace he was and is by the laws of the State of Illinois duly authorized to administer oaths. And I do further certify that I am well acquainted with the handwriting of the said Benjamin Coombe, and verily believe his signature to said affidavit subscribed to be genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Galena, this 17th day of September, A. D. 1856.

[SEAL.] Attest: RICHARD SEAL, *Clerk.*

78 *Adm'r's report.*

STATE OF WISCONSIN, *County of Grant:*

In probate in the county court of said county.

In the matter of the estate of Matthias C. Comstock, dec'd.

I, Edwin Ripley, adm'r of the estate of Matthias C. Comstock, late of the county of Jo Daviess and State of Illinois, do respectfully submit to your honor the following report of the condition of said estate as well of money received as of money expended by me, belonging to the same, in the said county of Grant and State of Wisconsin.

At the time of the granting of letters of administration upon said estate in said county to me there was not, and has not since been, any personal property of any kind or description, to my knowledge, belonging to said estate in said county, and all debts due to said estate from persons residing in said county have been accounted for by me, in my settlement of said estate in the county of Jo Daviess and State of Illinois, so far as the same or any portion thereof have been paid to me. A certified copy of the county court of said Jo Daviess County, made in said settlement, has been heretofore filed in this court, to which reference is hereby made.

The only money received by me and belonging to said estate has been received for the lands of said estate sold by me under and by virtue of an order of sale granted by this honorable court, at the August term thereof, A. D. 1856, a full report of which sale has been heretofore presented to and approved of by this court. From which said sale I have received the sum of ten thousand six hundred and fifty-five dollars, ($10,655 00,) as will more fully appear by reference to the report of said sale above mentioned.

79 I have paid on account of taxes aforesaid upon the lands of said estate in said county of Grant the sum of one thousand four hundred and eighteen 70-100 dollars, ($1,418 70.) Said taxes were paid on lands of Comstock & Mede, one half of which, amounting to the said sum of $1,418 70, were properly chargeable to said estate, as appears by the tax receipt herewith presented.

I have also paid the following sums of money for services rendered to said estate and expenses in attending to the same:

Probate fees	$28 00
To J. Allen Barber for professional services about business of said estate	143 60
To Carne & Goldsmith for advertisements	7 00
E. D. Lenny for professional services rendered said estate	25 00
Messrs. Weigley & Jewett for general services, settlement of said estate	200 00
Messrs. Weigley & Jewett for drafting 40 adm'r's deeds	150 00
	1,972 30

I also ask to be allowed for my own expenses and services in taking care of the lands of said estate, and paying taxes thereon since the granting of administration of said estate to me, the sum of one thousand dollars, it being in full of charges and expenses by me against said estate in said county, $1,000.

And I do hereby further report that I have paid all the debts of said estate, and all charges and expenses of administration in said county of Grant

80 so far as they have become known to me, excepting the said indebtedness of said estate to me in said county of Jo Daviess, in the State of Illinois, and certified to this court by the county court of said county; and

I now ask of this court to allow me as proper claims against said estate, all sums and charges above named, and that the same may be paid out of the proceeds of said estate. And I do hereto subjoin a true copy of my account as administrator of said estate in said county of Grant, by way of recapitulation:

Edwin Ripley, administrator of estate of M. C. Comstock, deceased, in account with said estate in Grant county, Wis:

To amount received on sale of lands in said county as above stated, being total amount of receipts		$10,655 00
Cr.		
1840, taxes	1,468 70	
Dec. By paid probate fees	13 00	
1845, Aug. 22, J. Allen Barber, counsel and att'y's fees	143 60	
1857, Jan'ry 21	15 00	
Publisher's fees	7 00	
E. D. Lowry's fees	25 00	
Messrs. Weighley & Jewett, att'ys' fees	350 00	
My own ch'gs and expenses	1,000 00	
Total amount of payment and expenses		2,972 30
And leaving in my hands belonging to said estate		7,682 70

And I do now ask of this court that the said balance so remaining in my hands as aforesaid, amounting to the sum of $7,682 70 be applied to
81 the payment of the indebtedness of said estate to me, as certified to this court by the county court of Jo Daviess County, in the State of Illinois.

And I do further report that the sale of lands above referred to was of all the lands belonging to said estate in said county of Grant, and there is now in said county no property, real or personal, belonging to said estate to my knowledge. All of which is respectfully submitted.

EDWIN RIPLEY,
Adm'r of the Estate of M. C. Comstock, dec'd.

State of Illinois, *Jo Daviess County, ss:*

Edwin Ripley, being first duly sworn, deposes and says that he is the same person who as administrator of the estate of Matthias C. Comstock subscribed the foregoing report; that the said report has been read to him, and he knows the contents thereof, and that the several matters and things therein stated and the account thereby rendered are true and correct, mistakes excepted, and that the same presents a just account of the condition of the estate of Matthias C. Comstock, in the county of Grant, and State of Wisconsin.

EDWIN RIPLEY.

I, Richard Seal, clerk of the county court within and for the county of Jo Daviess, State of Illinois, do hereby certify that the foregoing affidavit of Edwin Ripley was subscribed and sworn to by him before me this
82 18th day of May, A. D. 1857. In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Galena, this the 18th day of May, A. D. 1857.

[L. s.] Attest: RICHARD SEAL, *Clerk.*

83 *Administrator's sale.—Comstock.*

Notice is hereby given that the undersigned, administrator of the estate of Matthias C. Comstock, deceased, by virtue of an order of license from the county court of Grant County, State of Wisconsin, made on the 4th day of August, A. D. 1856, will expose for sale, at public auction, at the Empire House, in the village of Hazel Green, in said county, on the 5th day of December, A. D. 1856, commencing at one o'clock in the afternoon of said day, the following described real estate, to wit: The S. ½ and NW. ¼ and W. ½ of NE. ¼ of section No. 1, township No. one (1) north, of range No. one (1) west; section No. eleven (11) and section No. twelve (12) in same town and range; N. ½ and E. ½ of SE. ¼ of section No. thirteen (13) and the N. ½ and W. ½ of SW. ¼ of section No. fourteen, (14,) same town and range; section No. fifteen (15) and twenty-three (23) in same town and range; SW. ¼ and SW. ¼ of NW. ¼ of section No. twenty-four, (24,) the W. ½ of NW. ¼ and the W. ½ of SW. ¼ of section No. twenty-five, (25,) and W. ½ of SE. ¼ and W. ½ of NE. ¼ of section No. twenty-six, (26,) same town and range; section No. thirty-four (34) and thirty-five, (35,) same town and range, W. ½ of NW. ¼ W. ½ of SW. ¼, and E. ½ of SE. ¼ of section No. thirty-six, (36,) same town and range; the W. ½ and the NE. ¼ and W. ½ of SE. ¼ of section No. thirty-six (36) in township two (2) north, of range No. one, (1,) all in said county of Grant, State of Wisconsin. Terms of sale, cash in hand at the time of sale.

Dated November 6th, A. D. 1856.

EDWIN RIPLEY, *Administrator of said estate.*

84 *Proof of publication.*

STATE OF WISCONSIN, *County of Grant, ss:*

LANCASTER, *December 1st*, 1856.

I, N. C. Goldsmith, do solemly swear that I am the foreman-printer and one of the publishers of the Grant County Herald, a weekly newspaper printed and published at Lancaster, Grant County, Wisconsin, and I do solemnly swear that the annexed notice has been published four (4) weeks successively in said newspaper, commencing in No. 20 of vol. 8 of said paper, published on the 8th day of November, A. D. 1856, and ending with No. 23 of vol. 8, published on the 29th day of November, A. D. 1856.

N. C. GOLDSMITH.

Subscribed and sworn to this 1st day of December, A. D. 1856, before me.

J. T. MILLS, *Not. Public.*

Printers' fees, 4 insertions, 4 folio	$4 00
Certificate	25
	4 25

I, Ed. D. Lowry, of Grant County, State of Wisconsin, do solemly swear that on the eighth day of November, A. D. 1856, I caused a notice, which is hereto attached, to be published in the Grant County Herald, a weekly newspaper published at Lancaster, Grant County, Wisconsin, and on the same 8th day of November, A. D. 1856, I posted up printed notices (being true copies of notice hereto attached) of said sale, in three public places
85 in the town of Smelzer, township No. 2 north, of range No. 1 west, being the same town in which a portion described in said notice is situated. And also, on the same 8th day of November, A. D. 1856, I posted

up printed notices, copies of the notice annexed, in three public places in the town of Hazel Green, township 1, range 1 west, being the same town in which a portion of land described in said notice is situated And I do further solemly swear that said notices were posted as above set forth more than three weeks previous to the day fixed for said sale.

ED. D. LOWRY.

Subscribed and sworn to before me this 5th day of Jan'ry, 1857.

STEPHEN O. PAINE, *County Judge.*

STATE OF WISCONSIN, *County of Grant, ss:*

County court, January term, A. D. 1857, January 5th, 1857.

In the matter of the estate of M. C. Comstock, deceased.

Present: Stephen O. Paine, judge.

On this day came Edwin Repley, the administrator of the estate of said deceased, and filed in this court his report of sale of all the real estate of said deceased, which he was heretofore licensed to sell, a list of which real estate and the names of the persons to whom the same was sold is contained in said report, as will appear by a record thereof on pages 28, 29,
86 30, 31, and 32 of Probate Records of said court, of this date, and on a full examination of the said report, and the matters and things therein contained; and it now appearing to the satisfaction of the court here that the said administrator has complied with all the requirements of the law, and that the several sales of the said several tracts of land described in said report to the said several persons named therein was fairly conducted and legally made; that the prices bid therefor is not disproportionate to the value thereof; that he took and subscribed the oath required by law, and gave the notice as ordered by this court and prescribed by the statutes. It is ordered by the court here that said sale of all of said lands described in said report to the said several persons named therein is hereby confirmed by the court; and the said administrator is hereby ordered to execute conveyances therefor to said several purchasers accordingly.

Jan'y 5th, 1857.

STEPHEN O. PAINE, *County Judge.*

87 STATE OF WISCONSIN, *County of Grant, ss:*

County court, May term, A. D. 1857.

In the matter of the estate of M. C. Comstock, deceased.

Present: Stephen O. Paine, judge.

On this day was heard and considered the administration account of Edwin Ripley, from which it appears that the said administrator has realized from the real estate of said deceased, by a sale thereof, under an order of this court, the sum of ten thousand six hundred and sixty-five dollars; and that the expenses of such administration, including his fees and disbursements, a sum amounting to two thousand nine hundred seventy-two and 30-100 dollars, leaving a balance in his hands of seven thousand six hundred eighty-two and 70-100 dollars to apply on the debts against said estate, and the said Edwin Ripley being the sole creditor of said estate, as appears by the records of this court, it is ordered that the aforesaid sum of $7,682 70-100 be by him applied on his claim allowed him by this court against said estate. And it is further ordered that the administration account aforesaid be, and the same hereby is, approved and allowed, and ordered to be entered at large upon the records of this court as a final settlement and close of the

business of said estate, and that said administrator's various acts and doings in the management of the business of said be, and they hereby
88 ratified and approved, and he relieved from any further trust and liability in the premises.

Dated May 19th, 1857.

STEPHEN O. PAINE, *County Judge.*

89 STATE OF WISCONSIN, *Grant County, ss:*

I, Wm. McGonigal, county judge of Grant County, in the State of Wisconsin, do hereby certify that I have compared the foregoing copies with original records thereof, now remaining in the office of the judge of the county court of said county, and that the same are true transcripts from the same and the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court, at Lancaster, in said county, this 20th day of September, 1864.

[SEAL.] WM. McGONIGAL, *County Judge.*

90 *Matthias C. Comstock, by adm'r, to Jefferson Crawford.*

To all to whom these presents shall come, Edwin Ripley, of Galena, in the county of Jo Daviess and State of Illinois, administrator of the goods and estate which were of Matthias C. Comstock, late of said county, deceased intestate, sends greeting:

Whereas at the August term of the county court of Grant County, in the State of Wisconsin, in the year of our Lord one thousand eight hundred and fifty-six, in the matter of the petition of Edwin Ripley, administrator as aforesaid, for leave to sell the real estate of which the said Matthias C. Comstock died seized, situated and being in the county of Grant and State of Wisconsin aforesaid, or so much thereof as should be necessary to pay the debts of said estate and all the expenses of administration, it was ordered and decreed by said court, sitting as a court of probate, at said August term of said court, to wit, on 4th day of August, A. D. 1856, in the manner following, to wit:

In probate, Grant County court, August term, A. D. 1856.

In the matter of the estate of Matthias C. Comstock, deceased.

Present: Stephen O. Paine, judge.

91 Pursuant to an order of this court made in said matter on the 14th day of June, A. D. 1856, the petition of Edwin Ripley, administrator of said estate, praying for license to sell all the real estate of said deceased in said county of Grant, was this day heard and considered, and the affidavit of Joseph C. Cover showing that the notice required by said order to be given has been published as ordered, being filed and it satisfactorily appearing to the court now here, from said petition, (no adverse appearance or objection being made,) that a sale of said real estate is necessary for the payment of the valid claims against said deceased and the charges of administration, it is ordered that the said administrator be, and he hereby is, licensed, authorized, and fully empowered to sell the following described lands, to wit:

The S. h'f and NW. q'r and W. h'f of NE. q'r of sec. No. one, in township No. one north, range No. one west; section No. eleven and sec. No. twelve in the same town and range; the N. h'f and the E. h'f of SE. q'r of sec. No. 13, and the N. h'f and W. h'f of SW. q'r of sec. No. 14, in same town and

range; sections No. 15 and 23, in same town and range; the SW. and SW. q'r of NW. q'r of section No. 24; the W. h'f of NW. q'r and the W. h'f of SW. q'r of sec. No. 25, and the W. h'f and the SE. q'r and W. h'f of NE. q'r of sec. No. 26, in same town and range; sections No. 34 and 35, in
92 same town. and range; the W. h'f of NW. q'r, the W. h'f of SW. q'r, and the E. h'f of SE. q'r of section No. 36, in same town and range; the W. h'f and NE. q'r and W. h'f of SE. q'r of sec. 36, in township No. two north, of range No. one west, all in Grant County in the State of Wisconsin. And it is further ordered that before making sale of said real estate, or any part thereof, the said administrator take and subscribe the oath as required by statute in such cases; the bond of the said administrator heretofore filed by him being deemed amply sufficient, no other or further bond is required. And the said administrator is also required to cause notice of the time, place, and terms of said sale to be posted up in three of the most public places in the towns, respectively, in which said lands lie, three weeks at least previous to said sale, and that he cause like notice of such sale to be published for three weeks previous to such sale in the "Grant County Herald," a weekly newspaper published in the town of Lancaster, in said county, and that said sale be held in the county in which said lands are situated, at public vendue, between the hours of nine o'clock in the forenoon and the setting of the sun; and that immediately on accomplishing a sale of said lands, or any part thereof, he report the same to this court, together with proofs of having given the notice required by this order.

Dated August the 4th, 1856.

STEPHEN O. PAINE, *County Judge.*

93 And whereas in pursuance of said order and license of sale, I did on the fifth day of December, A. D. 1856, proceed to sell lands described in said order of sale at the "Empire House," in the village of Hazel Green, in said county of Grant and State of Wisconsin, after having taken the oath and given the notice of the time and place of said sale according to law and the requirements of said order, at public vendue, at which time and place the following described portions of said lands, to wit: The undivided half of the south half of section twenty-six, and west half of southwest quarter of section twenty-five; the undivided half of the east half of the southwest quarter of section thirty-five, all in township No. one north, of range No. one west, in the county of Grant, in the State of Wisconsin, containing in all 480 acres, were struck off and sold to Jefferson Crawford, being the highest and best bidder therefor, for the sum of seven hundred and twenty dollars:

Now, therefore, know ye that I, the said Edwin Ripley, administrator as aforesaid, by virtue of the order and license aforesaid, and in consideration of the sum of money aforesaid to me in hand paid by the said Jefferson Crawford, the receipts whereof I do hereby acknowledge, do hereby grant, sell, and convey unto the said Jefferson Crawford, his heirs and assigns, forever, all the lands so struck off to him and sold as
94 aforesaid. To have and to hold the aforegranted premises, with the appurtenances, unto the said Jefferson Crawford, his heirs and assigns, forever.

In witness whereof, I, the said Edwin Ripley, in my said capacity of administrator, have hereunto set my hand and seal this day of December, A. D. 1856.

EDWIN RIPLEY,
Administrator of Estate of Matthias C. Comstock.

In presence of—
RICHARD SEAL.
W. WEIGLEY.

STATE OF ILLINOIS, *Jo Daviess County, ss:*

Be it remembered, that on this twenty-second day of December, A. D. 1856, personally appeared before me, the undersigned, clerk of the county court within and for said county and State, Edwin Ripley, whose name appears subscribed to the foregoing deeds and who is personally known to me to be the identical person who, in his capacity of administrator of the estate of Matthias C. Comstock, signed said deed, and acknowledged that he executed the same as such administrator freely and voluntarily for the uses and purposes therein expressed. And I do further certify that I am well acquainted with the handwriting of said Edwin Ripley, and know his signature to the aforesaid deed to be genuine, and that said deed is
95 executed and acknowledged in conformity to the laws of the State of Illinois.

In witness whereof, I have hereunto set my hand and affixed the seal of said county court this twenty-second day of December, A. D. 1856.

Attest: RICHARD SEAL, *Clerk.* [SEAL.]

Recorded April 22d, 1859, at 6 o'clock p. m.

Attest: J. H. EREANS, *Register of Deeds.*

STATE OF WISCONSIN, *County of Grant:*

I, E. S. Mears, register of deeds in and for said county, in said State, do hereby certify that I have carefully compared the foregoing with the original record of such deed, and find it to be a true and correct copy of the whole thereof. I further certify that said deed now appears of record in this office in volume K 2d of Deeds on pages 239, 240, and 241.

In witness whereof, I have hereunto set my hand and the seal of my office, at Lancaster, this 13th day of January, A. D. 1864.

[L. S.] E. T. MEARS, *Register of Deeds.*

96 And the plaintiff offered the same to show how and what sales had been made by Edwin Ripley, and offered to show that defendant purchased or pretended to purchase title to premises in controversy under another license, and for the purpose of showing further by other testimony the whole proceeding in Wisconsin, and that the same were a collusive attempt on the part of the administrator and the purchasers to alienate the plaintiffs' title, to which the defendant then and there objected. The court sustained the objection, to which the plaintiffs then and there excepted.

And the plaintiffs further offered to show, by Edwin Ripley, that, acting in the capacity of administrator under the license dated in 1845, he sold lands pertaining to the estate of M. C. Comstock to the amount of $10,665 instead of $8,000, and that he made such sales from 1845 to 1852, to which offer the defendant objected. The court sustained the objection, to which the plaintiffs then and there excepted. And the court did thereupon charge the jury that the defendant had shown title out of the heirs of Matthias Calvin Comstock, deceased, to the premises in controversy, and that their verdict should be for the defendant, to which the plaintiffs then and there excepted as contrary to law and also as against evidence; and the jury thereupon found a verdict for the defendant of not guilty.

97 And the foregoing is all the testimony produced by either party on the said trial.

And afterwards, on the 27th day of September, 1864, the plaintiffs, because of the foregoing rulings and decisions, asked and moved the court to set aside said verdict and for a new trial, and the court denied said motion, to which the plaintiffs then and there excepted. And for the reason that

none of said exceptions appear of record herein, plaintiffs ask that this their bill of exceptions be signed, sealed, and enrolled herein.

And it is done, at Milwaukee, the 27th day of Sept., A. D. 1864.

SAM. F. MILLER. [SEAL.]
A. G. MILLER. [SEAL.]

And afterwards, on the 29th day of September, 1864, came the plaintiffs, by their attorneys, and filed their bond to the defendant in error, duly approved, in the words and figures following, to wit:

98 Supreme Court of the United States.

CHARLES COMSTOCK, JOHN R. COMSTOCK, HELEN E. COMstock, Adaline A. Hyde, William S. Hyde, Thirza A. Anderson, Phebe C. Allen, Mahala A. Hutchinson, Aaron A. Hutchinson, Thomas E. Whitney, Sarah E. Davenport, and John Davenport } In error.

vs.

JEFFERSON CRAWFORD.

Know all men by these presents that we, Edwin L. Buttrick and Edward J. Hill, are held and firmly bound unto the above-named Jefferson Crawford in the sum of two hundred dollars, to be paid to the said Jefferson Crawford, his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated September 29, A. D. 1864. Whereas the above-named plaintiffs have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the ninth circuit and district of Wisconsin: Now, therefore, the condition of this obligation is such that if the above-named plaintiffs shall prosecute their said writ of error to effect, and answer all damages and costs if they shall fail to make good their plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

EDWIN L. BUTTRICK. [SEAL.]
EW'D J. HILL. [SEAL.]

Sealed and delivered in presence of—
A. J. LOVELY.

Approved Sept. 28, 1864.

SAM. F. MILLER, *Judge.*

99 And afterwards, on filing said bond so approved, on the 29th day of September, 1864, a writ of error and citation were duly issued; and same day citation was returned, endorsed as follows:

"The defendant in error hereby admits service of the within citation this 29th day of September, A. D. 1864.

"GEORGE W. LAKIN, *Att'y for the Def't in Error.*"

100 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of

America for the district of Wisconsin, before you, between Charles Comstock, John R. Comstock, Helen E. Comstock, Adaline A. Hyde, William S. Hyde, Aaron A. Hutchinson, Mahala A. Hutchinson, Thirza A. Anderson, Phebe C. Allen, Thomas E. Whitney, John Davenport, and Sarah E. Davenport, plaintiffs, and Jefferson Crawford, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, to wit, of the damage of $5,000, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, that of right and according to law and custom of the United States should be done.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this twenty-ninth day of September, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

A. SCOTT SLOAN, *Clerk.*

Filed 7 Dec., 1864.

101 UNITED STATES OF AMERICA, *ss:*

To Jefferson Crawford, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the ninth circuit and district of Wisconsin, wherein Charles Comstock, John R. Comstock, Helen E. Comstock, Adaline A. Hyde, William S. Hyde, Aaron A. Hutchinson, Mahala A. Hutchinson, Thirza A. Anderson, Phebe C. Allen, Thomas E. Whitney, John Davenport, and Sarah E. Davenport are plaintiffs, and you are defendants, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this twenty-ninth day of September, in the year of our Lord 1864.

SAM. F. MILLER,
One of the Justices of the Supreme Court of the United States.

102 The defendant in error hereby admits service of the within citation this 29th day of September, A. D. 1864:

GEORGE W. LAKIN, *Att'y for the Def't in Error.*

Filed 7 Dec'r, 1864.

43

SUPREME COURT OF THE UNITED STATES.

COMSTOCK'S HEIRS vs. CRAWFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

BRIEF FOR PLAINTIFFS IN ERROR.

BUTTRICK & HILL,

Attorneys for Plaintiffs in Error,

MILWAUKEE, WISCONSIN.

STARR & SON, Law Printers, Milwaukee, Wisconsin.

UNITED STATES OF AMERICA.

IN SUPREME COURT.

DECEMBER TERM, A. D. 1864.

CHARLES COMSTOCK, et. als.,
Plaintiffs in Error.
vs.
JEFFERSON CRAWFORD.
Defendant in Error.

ERROR TO THE CIRCUIT COURT FOR THE DISTRICT OF WISCONSIN.

Brief and Points for Plaintiffs in Error.

STATEMENT OF THE CASE.

The plaintiffs in error, brought ejectment for undivided 3-10 of 680 acres of land, situate in Grant County, Wisconsin. They proved title as heirs at law of Matthias Calvin Comstock, who died in 1838, domiciled and resident in Illinois, its value at $3,000 and possession by defendant.

To overthrow this, defendant produced exemplifications of probate records, an unrecorded license, deeds from E. Ripley, Administrator, and parol testimony, which were admitted subject to exceptions. Plaintiffs then proffered exemplification from probate records, and parol testimony which were excluded and exceptions taken. The Court charged the jury that defendant had shown title out of plaintiffs—exceptions were made—verdict

was for defendant. There was a motion for new trial, it was overruled. Plaintiffs excepted. The testimony is preserved by the bill of exceptions which presents the errors assigned.

The exemplifications from the records of the Probate Court of Iowa County show that proceedings were had therein, viz:

At a special Court of probate held at the probate office in the town of Mineral Point, in and for the County of Iowa, letters of administration were by me duly granted to Charles Comstock of all and singular the goods and chattels, rights and credits, that were of the estate of Matthias C. Comstock, late of Galena, in the State of Illinois, deceased, he first entering into bonds to this Court in the sum of $3,000, with Moses Meeker and Charles Gear, as sureties, which were approved by the Court, and taken an oath, for the faithful performance of his duties as administrator which said bond and oath are on file in this office, which said Letters of Administration are in the words following, that is to say:

TERRITORY OF WISCONSIN, }
IOWA COUNTY. }

To all whom these presents shall come—GREETING.

Know ye that, whereas Matthias C. Comstock of the County of Jo Daviess and State of Illinois, died as it is said on or about the 29th day of November, A. D. 1838, having at the time of his decease personal property in this territory which may be lost destroyed or diminished in value if speedy care be not taken of the same. To the end therefore that the said property may be collected and preserved for those who shall appear to have a legal right or interest therein, we do hereby appoint Charles Comstock of the County of Jo Daviess and State of Illinois, administrator of all and singular the goods and chattels, rights and credits, which were of the said Matthias C. Comstock, at the time of his decease with full power and authority to secure and collect the said property and debts wheresoever the same may be found in this Territory and in general to do and perform all other acts which may be required of him by law.

In witness whereof I hereunto set my hand and seal of office, at the town of Mineral Point, in the County of Iowa this fifth day of September in the year of our Lord eighteen hundred and thirty-nine.

[L. S.] PARLEY EATON, Judge,

A true record. PARLEY EATON, Judge of probate.

Then follows oath, and bond of Charles Comstock.

Then comes a letter:—

"ATHENS, Bradford County, Pa.
October 21, 1839.

"PARLEY EATON, Esq.

Judge of Probate of Iowa County, Wisconsin Territory.

Dear Sir:—As I am unable to return to Galena to attend to the settlement of the estate of M. C. Comstock, I wish you to grant letters of Administration *de novo* to my friend and brother-in-law, Mr. Edwin Ripley.

Yours very respectfully,
CHAS. COMSTOCK."

Upon the back of this letter is endorsed:

"Charles Comstock's resignation of Adm'r of M. C. Comstock filed the 12th day of February 1840. Parley Eaton, Judge of Probate." And in Book L. p. 125, the following entry:

At a special Court of Probate held this 12th day of February in the year 1840, Charles Comstock resigned his trust as administrator, of the estate of M. C. Comstock, and returned into this office, the said letters granted 5th September 1839, which resignation was accepted and filed in this office.

Attest, PARLEY EATON Judge of probate.

Another entry follows, page 126.

At a Court of probate held on the 12th day of February 1840. Edwin Ripley was appointed administrator of the Estate of Matthias C. Comstock, and entered into bail in the amount of three thousand dollars, Levi Sterling and William Davidson sureties, which were approved and bond-filed, also oath filed which said letters of administration are as follows:

TERRITORY OF WISCONSIN, } ss.
IOWA COUNTY.

To all whom these presents shall come—GREETING.

Know ye that whereas Matthias C. Comstock of the County of Jo Daviess and State of Illinois died intestate as it is said about the 29th day of November, 1838, having at the time of his decease, personal property in this territory which may be lost destroyed or diminished in value if speedy care be not taken of the same. To the end therefore that the said property may be collected and preserved for those who appear to have a legal in-

terest therein, we do hereby appoint Edwin Ripley of the County of Jo Daviess and State of Illinois, administrator of all and singular the goods and chattels, rights and credits, which were of the said Matthias C. Comstock at the time of his decease with full power and authority to secure and collect the said property and debts wheresoever the same may be found in this Territory and in general to do all other acts which may now or hereafter be required of him by law.

In witness whereof I have hereunto set my hand and affixed the seal of office at the Probate office, at Mineral [L. S.] Point, in the County of Iowa, this 12th day of February in the year 1840.

PARLEY EATON, Judge of Probate.

Recorded this 12th day of February, 1840.

PARLEY EATON, Judge of Probate.

Then follows oath and bond, as before.

I.

The admission of this record was error.

1. The appointment of a general administrator for the estate of a non-resident intestate was void.

2. If the first letters were good, the second are bad. Unless enabled by statute administrators cannot resign.

1. According to "An act establishing Courts of probate defining their jurisdiction and powers and directing the settlement of estates therein,*" the Probate Court of Iowa County had jurisdiction to take probate of wills and grant LETTERS OF ADMINISTRATION *only* on the estates of persons domiciled or resident in Iowa County at the time of their decease.

* R. S. Wisconsin 1839, pp. 296–310. Sections 1 and 2.

1. Of the Probate Court, and proceedings therein.

SEC. 1. A Court of Probate shall be held in each of the several Counties of this Territory, and there shall be some able and learned person appointed in each of said Counties as judge of said Court, who shall take an oath to support the Constitution of the United States of America, and faithfully and impartially to discharge the duties required of him by law.

SEC. 2. Said Court shall have power to take the probate of wills grant letters of administration on the estates of persons deceased, having been inhabitants of, or residents in the same County at the time of their decease. * * * * * * * * *

SEC. 23. After the decease of any person intestate, administration of such intestate's goods and estate shall be granted to the widow or next of kin to the intestate (upwards of twenty-one years of age) or both, as the judge of probate shall think fit, within thirty days or sooner * * * * *; and after the expiration of thirty days from the death of any intestate, in case the widow or next of kin shall refuse or neglect to take out letters of administration, being cited before the judge of probate for that purpose, in case they are resident within the county, he may commit administration of any such estate, to some one or more of the principal creditors, if accepted by them, or others, if he shall think fit after their refusal.

Harvard College vs. Gore, 5 Pick. 370.
Holyoke vs. Haskins, Id. 20.
Cutts vs. Haskins, 9 Mass. 543.
Moore vs Philbrich, 32 Maine 102.
Weston vs. Weston, 14 Johns. 428.
Goodrich vs. Pendleton, 4 Johns. ch. 549.

The only provision relative to the estates of non-resident intestates which existed in Wisconsin, prior to February 20, 1845, is to be found in the second section of "An act concerning the appointment of public administrators and their duties."

R. S. 1839, pp. 83-85.

SEC. 1. There shall be appointed in each of the organized counties on the nomination of the governor, by and with the advice and consent of the council, a suitable person to be known as the public administrator of the County for which he may be appointed.

SEC. 2. When any person shall die intestate, having goods and chattels, rights and credits in this territory, and no widow, next of kin or creditor shall be living within the territory, administration of such intestate's estate shall be granted to the public administrator of the county in which such intestate died, or if the intestate be a non-resident in the county in which the goods, chattels, rights and credits may be found.

SEC. 7. (Provides for disposal of estate.)

SEC. 8. Upon the death of any person intestate, not leaving a widow, next of kin or creditor to whom administration may be granted, it shall be lawful for the public administrator to take measures to secure the property and effects of such intestate, from waste and embezzlement, until administration thereon shall be granted.

SEC. 9. The public administrator shall be liable in the same manner and to the same extent that executors and administrators are by law liable for waste, mismanagement or neglect of duty on the complaint of any citizen of the county, and shall have like powers in the settlement of estates, which may be committed to his administration.

These acts were in force from July 4, 1839. In 1845, "An act to extend the jurisdiction of judges of probate" gave the power to issue general letters in case of non-residents deceased.

Session Laws 1845, p. 9.

SEC. 1. Whenever any non-resident of this Territory owning property in this Territory, or having choses in action against any inhabitant thereof, shall die without the Territory, letters of administration on the estate of such deceased person may be granted by the judge of probate of the County where any such property may be, or where the person may reside, against whom such choses in action may exist.

Approved February 20th, 1845.

It may not be unworthy of remark that in the acts granting general powers the expression "Letters of Administration" is used, while in the public administrator act the term "administration" alone occurs. Both expressions are well defined in the law and each has peculiar significancy and force.

The probate proceedings in question took place in September, 1839, and in February, 1840. The act of 1845, cannot therefore apply.

In every case of intestacy the residence or domicil of the deceased, was material. If *late of any county* within the territory, and a widow, next of kin or creditor appeared, the Court of that County could issue general letters, could appoint and empower a general administrator over his estate within the territory. The Court had a broad discretion and error in its exercise could not be collaterally shown. The appointment would not be void but voidable.

6 Peters 729, and cases there cited.

If no relatives or creditors appeared it would seem that the Court of the County of decedent's domicil or residence was commanded to issue letters to the public administrator of that County.

But in case of a non-resident intestate, the administration of

his estate, belonged to the public administrators of the several counties in which his personalty might be found. The appointment was not given to any Court. The governor and council had made it. The public administrator—*executor a lege constitutus*—like an *executor a testatore constitutus* was ever present ready to receive the administration, to perform his duties prescribed by law, to execute and carry out the process, the orders decrees and sentences of his Court. The issue of general letters, the appointment of a general administrator over the estate of M. C. Comstock was therefore extra judicial and absolutely void.

Griffith vs. Frazier, 8 Cranch. 9, is in point.

Warner vs. People, 2 Denio 272.

People vs. White, 24 Wend. 539–541.

1 J. J. Marsh, 205, 206.

Reynolds vs. Orvis, 7 Cow. 269.

No goods or effects in Iowa County appear by the record. But it is insisted that the defect may be supplied by parol. The testimony was admitted. This was clearly error. By this testimony the defendant only confirmed the title of the public administrator of both Iowa and Grant Counties, and annulled the record upon which he relied.

The rule that facts essential to the jurisdiction of inferior Courts must appear upon the face of their proceedings it was contended, has been changed. (See Chap. 127. p. 145, Laws 1861)

But can this record be aided either directly or indirectly by subsequent legislation?

Cornell vs. Hichens, 11 Wis. 371.

Smith vs. Cleveland, Mss. opinion S. C. Wisconsin.

The record must stand upon its own merits. Extraneous evidence or healing legislation cannot give it life, if it never had vitality.

2. Administrators cannot resign unless enabled by statute.

Sitzman vs. Pacquette, 13 Wis. 291, and cases there cited.

Charles Comstock resigned, Edwin Ripley was appointed.

The Court disregarded this rule, holding that an administrator

could resign, while perhaps an executor could not, because the executor derives his power from the will, the administrator from the Probate Court. It then becomes material to inquire, concerning this distinction between an administrator and an executor.

Blackstone states the difference made by the Court below. 2 Bl. Com. 507, citing the anonymous case Comyns 151, which was distinctly overruled by the Court of K. B; Allen vs. Dundas, 3 Term, 125, which was trespass on the case for money had and received, to the intestate's use. P. died intestate. A forged will was proved. Upon the probate, defendant in good faith payed the amount in controversy to the supposed executor. Afterwards the Prerogative Court annulled the will and probate and issued general letters; the administrator brought suit, claiming that because the executor derived his power from the will, and not from the probate, the payment to the supposed executor fell with the will. The case Comyns, 151, was relied on, but the Court overruled the point, holding that the authority was from the probate.

Hence it may be stated generally that the distinction between an executor and an administrator is this:

An executor derives his appointment from the testator, his authority from the Court, and his duties are regulated by the law as modified by the will. An administrator derives his appointment from the Court, his power from the Court, and his duties are regulated by law.

The nature of the trust is the same in both—the administration upon the estate of deceased persons. To give any validity to their acts, both need the authority of the Probate Court.

This distinction was passed upon by the Court in Sitzman vs. Pacquette. JUDGE PAINE says:

"And an administrator stands upon the same footing as an executor who has proved the will and afterwards administered. For his title is derived from the law and made a matter of record in the first instance."

Whatever of authority the executor may receive from the will may be renounced before probate, hence it would seem that the authority derived from the probate is that which is not susceptible of resignation.

But the law settled by Sitzman vs. Pacquette, recognized as

the rule of the Supreme Court of Wisconsin in subsequent cases, Bailey vs. Scott, 13 Wis. 649, and unreported cases, is the law of this Court.

8 Cranch. 9, 3 Id. 319.
6 Peters, 291.

The exemplification from Grant County Probate Court, is as follows:

MATTHIAS C. COMSTOCK'S ESTATE.

GRANT COUNTY.—ss.

Be it remembered that at a Probate Court began and held at the Probate office at Lancaster, in Grant County W. Ty, on the 3d day of April, A. D. 1845. Present Hugh R Colter, Judge.

Edwin Ripley, Administrator of the estate of Matthias C. Comstock, late of Jo Daviess County in the State of Illinois, deceased intestate, duly appointed as such administrator of the Estate of said deceased by Probate Justice Court in and for the County of Jo Daviess aforesaid, and also duly appointed as such Administrator of the estate of said deceased by the Probate Court in and for the County of Iowa in the Territory of Wisconsin this day filed in the office of the Probate Court of Grant County aforesaid his written application for License and authority to sell so much of the real estate of said deceased lying and being in Grant County as may be necessary to enable said administrator to pay the sum of eight thousand dollars. Whereupon, it is ordered that said application be duly filed and recorded and which application is in the words and figures following:

Application to sell real estate.

"To the Hon. Probate Court of Grant County Wisconsin Territory."

"The undersigned administrator of the este of Matthias C. "Comstock late of Galena in the County of Joe Davies in the "State of Illinois deceased intestate and administrator of whose "estate real and personal in the Territory of Wisconsin hath been "granted by the Probate Court in and for the County of Iowa, "in said Territory, respectfully represents that the personal "estate of said deceased is not sufficient to pay his past debts by "the sum of eight thousand dollars. And said administrator "further presents to said Probate Court, the certificate of the "Justice of Probate of the County of Joe Daviess in said State

"also showing the condition of said estate, and that the personal "estate of said deceased is insufficient to pay the debts due from "said deceased by the said sum of eight thousand dollars.

"The undersigned therefore prays the Probate Court of Grant "County af'd agreeably to the statute in such case made and "provided to grant him License to sell so much of the real estate "of said deceased in the County of Grant W. Ty as will enable "him to pay the said sum of eight thousand dollars together with "the costs and charges attending said sale. Dated April 3d, "1845.

"EDWIN RIPLEY,
Adm'r, M. C. Comstock dec'd."

And the Court having duly considered of said application. It is thereupon ordered that said administrator do give due notice to all persons concerned by publication of notice of said application in the Wisconsin Herald, a weekly newspaper printed and published at Lancaster in said Territory of Wisconsin four weeks successively the last publication to be prior to the 3d Saturday of May, 1845. Which said third Saturday of May, A. D. 1845 at the Probate office at Lancaster in said Grant County the said Probate Court doth appoint as the time and place when and where a hearing will be had upon said application.

A true record Attest,

H. R. COLTER,
Judge Probate.

GRANT COUNTY,—ss.

At a Probate Court begun and held at the Probate office in Lancaster in the County of Grant, W. T'y on the 3d Saturday of May, A. D. 1845.

Present Hugh R. Colter, Judge Probate.

It appearing unto this Court that due notice of the application of the administrator of the estate of Matthias C. Comstock deceased intestate for License and authority to sell so much of the real estate of said deceased situated in Grant County, W. T'y, as would enable said admistrator to pay the sum of eight thousand dollars of the debts due and owing from said estate together with the costs and charges attending said sale has been duly given by said administrator agreeably to law and the order of this Court made at a previous day by publication of notice of said

application in the Wisconsin Herald a weekly newspaper printed and published at Lancaster in said Territory, proof of which publication hath been duly filed in this Court.

And said administrator having filed in the Probate office of Grant County aforesaid the following certificate under the hand and seal of Charles G. Thomas Probate Justice of the Peace in and for the County of Jo Daviess in the State of Illinois which certificate is in the words and figures following, viz :

"STATE OF ILLINOIS, }
"COUNTY OF JO DAVIESS, }

"I Charles G. Thomas Probate Justice of the Peace in and "for said County do certify that the personal property belonging "to the estate of Matthias C. Comstock late of said County of "Jo Daviess and State of Illinois has been exhausted in pay- "ment of the debts of said estate and that there are yet debts "on file in this office to the amount of about eight thousand dol- "lars against said estate unpaid.

"Given under my hand and the seal of the Probate
[L. S.] "Court at the probate office in Galena, the 23d day of
"April A. D. 1845.

"CHARLES G. THOMAS, P. J. P."

And it being made to appear unto this Court that it is necessary and proper that said Administrator should be Licensed and authorized and empowered to make sale of the real estate of said deceased, situated in Grant County, or so much thereof as will enable said administrator to pay the sum of eight thousand dollars debts due and owing from said estate, due proof of the existence and amount of said debts being made to this Court, and no person appearing to make or offer, any objection or show cause against said applicatiou of said administrator :—

The Court adjudge and decree that said Administrator be Licensed authorized and empowered to sell so much of the real estate of said deceased situated lying and being in the County of Grant as may enable said administrator to pay the sum of eight thousand dollars the debts due and owing from said estate together with the costs and charges attending said sale and that License duly issue to said Administrator agreeably to law.

And now on this 27th day of May 1845 the said administrator having duly executed a bond agreeably to law conditioned to

make due sale of said real estate and faithfully to account for the proceeds of sale in the penal sum of ten thousand dollars, which bond is by this Court approved, a License in due form of law issued to said administrator this day.

A true Record Attest,

H. R. COLTER,
Judge Probate.

ESTATE OF M. C. COMSTOCK.

TERRITORY OF WISCONSIN, } ss.
GRANT COUNTY. }

To the heirs at law and all persons interested in the estate of Matthias C. Comstock, late of Jo Davies County in the State of Illinois deceased intestate,

Notice is hereby given that Edwin Ripley, administrator of all and singular the goods, chattels, rights, credits and estate of said M. C. Comstock, deceased, hath represented unto the Probate Court of Grant County, Wisconsin Territory, that the personal estate of the said deceased is insufficient to pay the debts which said deceased owed, by the sum of eight thousand dollars; and praying the said Probate Court for license and authority to sell so much of the real estate of said deceased in said County of Grant as may be sufficient to pay the said sum of eight thousand dollars and the costs and charges attending said sale.

The Court of Probate doth therefore appoint the third Saturday of May, 1845, at one o'clock P. M. at the Probate Office in Lancaster, in said Grant County, when and where all persons interested may appear and show cause if any they have, why said application should not be granted.

Given under my hand and seal this third day of April, 1845.

H. R. COLTER,
Judge of Probate.

GRANT COUNTY, W. T'Y.

Jeremiah D. Spalding being duly sworn says that he is publisher of the Wisconsin Herald a weekly newspaper printed and published at Lancaster, W. T'y and was so publisher during the publication of the annexed advertisement. That the annexed notice has been duly published in said Wisconsin Herald for four weeks successively the last publication being previous to the 3d Saturday of May, 1845.

J. D. SPALDING.

Subscribed and sworn to before me this 3d Saturday of May 1845.

J. Allen Barber, Notary Public of Grant County Wisconsin Territory.

[L. S.] The Probate seal being hereunto annexed no public seal being yet provided.

M. C. COMSTOCK'S ESTATE.

Proof of publication of application sell real estate

Filed 3d Saturday of May, 1845.

H. R. COLTER, Judge Probate.

ESTATE OF M. C. COMSTOCK, Deceased.

Bond on sale of real estate.

Know all men by these presents that I Edwin Ripley, as principal, am held and firmly bound unto Hugh R. Colter Judge of Probate of Grant County Wisconsin Territory and to his successors in office in the penal sum of ten thousand dollars for payment whereof well and truly to be made, I bind myself my heirs executors and administrators firmly by these presents.

Signed sealed and dated May 27th, 1845.

The condition of the above bond is such that if the above bounden Edwin Ripley admistrator of the estate of Matthias C. Comstock late of Joe Daviess County in the State of Illinois, who hath this day been licensed and empowered by the Probate Court of Grant County, W, T'y to sell so much of the real estate of said deceased in said County of Grant as may be necessary to enable him to pay the sum of eight thousand dollars and the costs and charges attending said sale. Now if said Ripley shall observe all the rules and regulations and directions of the law for the sale of real estate, and the proceeds of such sale shall be disposed of agreeable to the rules of law, then this bond shall be void, otherwise of full force and virtue.

EDWIN RIPLEY, Administrator, [SEAL].
of Estate of M. C. COMSTOCK.

II.

The admission of this record was error.

The law under which these proceedings purport to have been made, are sections 25, 29 to 33 inclusive, R. S. 1839, pp 316, 317, and 318,—to-wit: —

Sec. 25. When the goods and chattels belonging to the estate of any person deceased, or that may hereafter decease, shall not be sufficient to answer the just debts which the deceased owed, or legacies given, upon representation, and the same being made to appear to the District or Probate Court of the County where the deceased person last dwelt, or in the County in which the real estate lies, the said Court is authorized to empower and license the executor or administrator of such estate to make sale of all or any part of the houses, lands or tenements of the deceased, so far as shall be necessary to satisfy the just debts which the deceased owed at the time of his death, and legacies bequeathed in and by the last will and testament of the deceased, with the incidental charges; and every executor or administrator being so licensed and authorized as aforesaid shall, and may by virtue of such authority, make, sign and execute in due form of law, deeds and conveyances of such houses, lands or tenements, as they shall so sell; which instrument shall make as good a title to the purchaser, his heirs and assigns forever, as the testator or intestate, being of full age, of sane mind and memory, in his or her lifetime, might or could have given for a valuable consideration.

Sec. 29. The said Court, previous to passing on any petition or representation for the sale of real estate, shall order due notice to be given to all parties concerned, or their guardians, who do not signify their assent to such sale, to show cause at such time and place as shall be appointed, why such licenee should not be granted; and in case any person concerned be not an inhabitant of this Territory, nor have any guardians, agent or attorney therein, who may represent him or her, the said Court may cause the said petition to be continued for a reasonable time, and the petitioner or petitioners shall give notice of said petition to such person, as the Court may direct, or cause the same to be published in some newspaper in this Territory three weeks successively.

Sec. 30. Executors, administrators, guardians or other persons authorized by order of Court to sell real estate shall, previous to any sale being made, give bond to the Judge of Probate for the County in which such real estate lies, that he or she will observe the rules or directions of law for the sale of real estate, and that the proceeds of such sale shall be disposed of agreeably to the rules of law.

Sec. 31. Every such executor, administrator, guardian or other person, authorized as aforesaid, shall, previous to any sale, take before the judge of Probate or some Justice of the Peace, the following oath: "I A. B. do solemly swear, that in disposing of the estate lately belonging to I will use my best skill and judgment in fixing on the time and place of sale, and that I will exert my utmost endeavors to dispose of the same of such manner as will produce the greatest advantage to all persons interested therein, and that without any sinister views whatever." And the said executors, administrators, guardians or other person, shall return to the Probate Court a certificate of the same under the hand of the Justice before whom such oath was taken.

Sec. 32. Every such person, before making sale of any real estate, or by or-

der of Court, shall give thirty days' public notice, by posting up notifications of such sale in the township where the lands lie, as well as where the deceased person last dwelt, and in the two next adjoining townships, and also in the county town of the County ; and whoever will give most shall have the preference in such sale.

Sec. 33. The affidavit of the executor or administrator, or the affidavit of such other person or persons as may be by them employed to post up such notifications, taken before the Probate Court, where such executor or administrator derived his authority to administer, within seven months next following the sale of the real estate, and there filed and recorded, together with one of the original advertisements of the time, place, and estate to be sold, or a copy of such advertisement, are hereby declared to be one mode of perpetuating the evidence that such notice was given, and also to make the originals, or copies thereof, admissible evidence in any Court of law ; and when the person employed by the executor or administrator to post up such notifications, resides more than ten miles distant from such probate office, his dispositions respecting that matter taken before a Justice of the Peace, and filed in such Probate Court within the seven months aforesaid, shall have the same force and effect as if the same was taken before the Probate Court ; and the printing a notification three weeks successively in such newspaper as the Court who may authorize the sale, shall order and direct, shall be deemed equivelant to the posting up of notifications as aforesaid.

The record does not support the license because :—

1. The Court had not jurisdiction of the heirs.

The case represented by the application, did not warrant the issue of process, pursuant to Sec. 29.

The representation should have been so plain and explicit that it would make a *prima facie* case. The amount and description of the goods and chattels, and a specific statement of the *just debts which the deceased owed*, were essential facts which were to be shown to the Court before it could act.

The names and residences, and the ages of the heirs should have been specified, so that the Court could determine exactly what process to issue.

Nothing appears to warrant the publication which was made.

2. The Court did not find facts sufficient to warrant the issuing of a license.

This is the main point in our case.

The record shows that Ripley filed a certificate, and that it appeared to the Court that it is necessary and proper that a license should issue and that due proof of the existence and the amount of the debts was made, but the all important fact, THAT THE

GOODS AND CHATTELS BELONGING TO THE ESTATE WERE INSUFFICIENT TO PAY THEM no where appears unless we resort to the contents of this certificate. But if we take that as a foundation for the license, or the order preliminary thereto, then it would be necessary to alter the statute, so it would read, "When it shall appear to any Probate Justice of the Peace in the State of Illinois that the personal property belonging to the Estate of any person deceased who at the time of his decease, was a resident of that State has been exhausted in the payment of the debts of said estate and there yet remain on file in his office debts to the amount of about $8,000, and a certificate under the hand and seal of said Justice is filed in any Probate Court in this territory in any County in which the lands of said deceased lie, and the said Court shall deem it necessary and proper that a license shall issue, the same may thereupon issue.

The case was not one in which a license might issue. The judgment of Charles G. Thomas, P. J. P. amounted to nothing, and is probably all there was before the Court, relative to debts, personally or anything else.

The fact essential to the validity of the order should have been proven to the satisfaction of the Probate Court of Grant County and that Court at least have recited it, a fact found, upon the record.

We are not without direct authority upon this point.

Rankin vs. Adams, S. C. Wis. 1864.

We file Mss. Copy of opinion and copies of case and brief.

All cases from Wisconsin cited below.

The license recites exactly how and to whom the fact appears.

"Wheras it appears by the certificate of the Probate Justice in and for the County of Jo Daviess aforesaid and by the records and files of the Probate Court of Grant County aforesaid that the personal estate of said deceased is not sufficient to pay his just debts by the sum of $8,000 and the costs attendinsg said sale.

Therefore you are hereby licensed &c."

This recital shows where it appears,—in the record. Resorting to the record, we learn to whom it appears,—to the P. J. P. of Jo Daviess County. The only fact to be passed upon,—the key—the touchstone of the whole proceeding is founded upon the decision of a P. J. P., of Illinois.

Had the Probate Court of Grant County inquired into and determined the existence of the fact, then the defendant in error might perhaps claim immunity under *Grignon vs. Astor*.

But is it claimed that because the fact is recited in the license, it is conclusive. Our answer is, *Sibley, vs. Waffle*, 16, N. Y. p. 189 190, precisely in point.

It is very evident that the Court had not the subject matter before it.

Its failure in this respect enabled Ripley to perpetrate a great fraud. Comstock left over $100,000 of property in Galena. His debts did not exceed $20,000 in 1838. Giving credence to the certificate and to the petition in the excluded record, it seems that Ripley squandered all the property belonging to the estate in Galena, while the records of the Iowa County Probate Court show that in January 1845, he obtained a license to sell real estate in that County to pay the same debts, upon a similar certificate of the P. J. P. of Jo Davies County. He sold between 1845 and 1856, lands to the amount of about $8 000, in Iowa County and lands in Grant County to the amount of $10,665. He received in the meantime from rents issues and profits of lands of Wisconsin over $8,000.

This accounts for the filing of the certificate and the bond of Ripley without any sureties; of the former sales, the heirs took but little notice, because they were abandoned in 1856 as soon as they came to their knowledge, and they were counseled that the sales of 1856 were fraudulent and void. Defendant in error appears to be one of the parties to the fraud.

These facts are outside of the record, but they were competent and should have been investigated. Had these inferior Courts in Wisconsin in 1845, acted judicially instead of ministerially, Ripley could not have obtained the licenses.

These facts show the necessity and justice of keeping such Courts within the proper limits.

In summary proceedings where a Court exercises an extraordinary power, under a special statute prescribing its course, we think, that course ought to be exactly observed, and those facts especially, which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*," (11-127) We do not understand that "*Grignon* vs. *Astor* militates against these

GOODS AND CHATTELS BELONGING TO THE ESTATE WERE INSUFFICIENT TO PAY THEM no where appears unless we resort to the contents of this certificate. But if we take that as a foundation for the license, or the order preliminary thereto, then it would be necessary to alter the statute, so it would read, "When it shall appear to any Probate Justice of the Peace in the State of Illinois that the personal property belonging to the Estate of any person deceased who at the time of his decease, was a resident of that State has been exhausted in the payment of the debts of said estate and there yet remain on file in his office debts to the amount of about $8,000, and a certificate under the hand and seal of said Justice is filed in any Probate Court in this territory in any County in which the lands of said deceased lie, and the said Court shall deem it necessary and proper that a license shall issue, the same may thereupon issue.

The case was not one in which a license might issue. The judgment of Charles G. Thomas, P. J. P. amounted to nothing, and is probably all there was before the Court, relative to debts, personally or anything else.

The fact essential to the validity of the order should have been proven to the satisfaction of the Probate Court of Grant County and that Court at least have recited it, a fact found, upon the record.

We are not without direct authority upon this point.

Rankin vs. Adams, S. C. Wis. 1864.

We file Mss. Copy of opinion and copies of case and brief.

All cases from Wisconsin cited below.

The license recites exactly how and to whom the fact appears.

"Wheras it appears by the certificate of the Probate Justice in and for the County of Jo Daviess aforesaid and by the records and files of the Probate Court of Grant County aforesaid that the personal estate of said deceased is not sufficient to pay his just debts by the sum of $8,000 and the costs attendinsg said sale.

Therefore you are hereby licensed &c."

This recital shows where it appears,—in the record. Resorting to the record, we learn to whom it appears,—to the P. J. P. of Jo Daviess County. The only fact to be passed upon,—the key—the touchstone of the whole proceeding is founded upon the decision of a P. J. P., of Illinois.

Had the Probate Court of Grant County inquired into and determined the existence of the fact, then the defendant in error might perhaps claim immunity under *Grignon vs. Astor*.

But is it claimed that because the fact is recited in the license, it is conclusive. Our answer is, *Sibley, vs. Waffle*, 16, N. Y. p. 189 190, precisely in point.

It is very evident that the Court had not the subject matter before it.

Its failure in this respect enabled Ripley to perpetrate a great fraud. Comstock left over $100,000 of property in Galena. His debts did not exceed $20,000 in 1838. Giving credence to the certificate and to the petition in the excluded record, it seems that Ripley squandered all the property belonging to the estate in Galena, while the records of the Iowa County Probate Court show that in January 1845, he obtained a license to sell real estate in that County to pay the same debts, upon a similar certificate of the P. J. P. of Jo Davies County. He sold between 1845 and 1856, lands to the amount of about $8 000, in Iowa County and lands in Grant County to the amount of $10,665. He received in the meantime from rents, issues and profits of lands of Wisconsin over $8,000.

This accounts for the filing of the certificate and the bond of Ripley without any sureties; of the former sales, the heirs took but little notice, because they were abandoned in 1856 as soon as they came to their knowledge, and they were counseled that the sales of 1856 were fraudulent and void. Defendant in error appears to be one of the parties to the fraud.

These facts are outside of the record, but they were competent and should have been investigated. Had these inferior Courts in Wisconsin in 1845, acted judicially instead of ministerially, Ripley could not have obtained the licenses.

These facts show the necessity and justice of keeping such Courts within the proper limits.

In summary proceedings where a Court exercises an extraordinary power, under a special statute prescribing its course, we think, that course ought to be exactly observed, and those facts especially, which give jurisdiction ought to appear, in order to show that its proceedings are *coram judice*," (~~14~~ 127) We do not understand that "*Grignon* vs. *Astor* militates against these

fundamental principles; every jurisdictional fact appears in the proceedings there, to have been found by the County Court, a Court of general jurisdiction, but we insist that it is different here.

3. The order or decree is a nullity, it is void for uncertainty.

Grignon vs. Astor, 2 How. 319, was by the Court below considered as a decisive answer to the objections taken to this record.

That case has no application here, for the record there emenated, from a Court of general jurisdiction, while the foregoing record comes from a Court of special limited and inferior jurisdiction. There the record was perfect and complete, in the language of the Court it was absolute verity. It appears there that an adjudication had been made, the necessity of the sale established and to meet it specific real property was designated. The judgment was in *rem* and of itself operated to divest the title of the heirs; after decree it remained for the ministerial officer to perform it. The decree was conclusive. But here there is nothing definite and certain, no judgment in *rem*, nothing to show that specific property has been affected, everything is left to the discretion of the administrator. This discretion should have been exercised by the Court. The necessary amount of property and its description, was as much to be ascertained and defined by the judgment, as the facts showing the necessity for a sale.

4. There is no proof of a license.

The 4th Section of the general act (R. S. 1839, p. 296) prescribes that the probate judge shall keep a registry of wills, administration accounts decrees, orders determinations and other writings which shall be made, granted or decreed upon by him.

The license came from the custody of Edwin Ripley. There seems to be no way to prove a record but by exemplification. The law requires a record, nothing appeared to warrant its introduction. The deeds are not evidence of their recitals. And unless the power has been properly executed are inadmissible for any purpose. Their admission was erroneous.

5. The license has not been executed.

The oath does not appear.

The requirements of Sections 32 and 33, are wanting.

No sale appears.

Was it in his discretion to omit taking and filing the oath?

Was it in his discretion to omit giving notice of sale?

Bright vs. Boyd, 1 Story 478.

Young vs. Dowling, 15 Ills. 481.

Gibb vs. Shaw, Wis. S. C., Oct. 1863.

6 Cow. 221.

3 Barb. 341.

12 Wis. 582.

15 Wis. 179.

10 Wis. 501.

Rankin vs. Adams, Mss. case S. C. Wis.

2 Doug., Mich, 433.

3 ~~Green~~, Iowa, 114. Clarke

The law requires it. *Ita lex scripta est.*

If the administrator can with impunity disregard these requirements, if the Court can act whenever requested upon the representation of facts which are wholly immaterial, why not dispense with the *lex terrae*?

The statute (Sec. 33) prescribes how evidence of the notice may be perpetuated *and for its admissibility in any Court of law.* No report of sale seems requisite. Hence the necessity of inquiring into the execution of such a special statutory power in collateral action.

6. The license has been abandoned.

Had the Court permitted the rejected portion of the record to come in, then it would have appeared that all parties in 1856 abandoned these proceedings and that neither defendant in error nor the administrator relied upon this imperfect record.

III.

The question whether notice was or not given, should have been submitted to the jury.

IV.

The instruction of the Court to the jury that defendant had shown title out of Comstock's heirs was erroneous.

Upon the universal principle stated 6 Peters, 729. "That

where power or jurisdiction is delegated to any public officer or tribunal over a subject matter, and its exercise is confided to his or her discretion, the acts so done are binding and valid as to the subject matter, and individual rights will not be disturbed collaterally for anything done in the exercise of that discretion within the authority and power conferred. The only questions which can arise between an individual claiming a right under the acts done and the public or any person denying its validity are power in the officer, and fraud in the party" we purpose to examine the power of Edwin Ripley and we insist upon an examination before a jury of the question of fraud in the party.

As to the power and discretion of the supposed administrator to sell our property:

"That no individual or public officer can sell and convey a good title to the land of another, unless authorized to do so by express law, is one of those self evident propositions, to which the mind assents without hesitation and that the person invested with such a power must pursue with precision the course prescribed by law or his act is invalid is a principle which has been repeatedly recognized by the Court." (6 Wheat., 135.)

The license issued to administrators to sell the property of the heirs, in such cases, is not a judgment *in rem* or *in personam*. It is a letter or power of attorney. Under the statute quoted above, the issuing of the license, exhausts the jurisdiction of the Probate Court. When the license issues the necessity upon which it is founded is *res adjudicata*. But this power remains to be executed. The plain simple provisions of the statute are to be complied with, these are a part of the letter. The whole proceeding from its origin to its complete execution, is a process, through which a superior title may be acquired. This process must be perfect and complete in all its parts. It is to be a matter of record. Before the license issues it must be recorded.

In this case we have no evidence of a license. It does not appear whether there is or is not a record of this license. There is an order for a license, and a minute for its emission, but no record is shown. Is not record the best evidence?

Conceding for the sake of argument that the license which comes from the pocket of Edwin Ripley is genuine then all that appears is a power of attorney that it has been executed, there is no proof.

A, issues a letter of Attorney to B, empowering him to sell blackacre, does this letter of attorney alone divest A's title to blackacre. Is this letter of attorney *a judgment in rem?* If A prescribes that blackacre shall be sold at a certain time in a particular manner, can B exercise his discretion and sell in some other manner, and at a differennt time?

The license and statute must be strictly pursued, for no man can be deprived of his property without due process of law.

To hold such a license, a judgment *in rem* is too broad, to consider it a judgment *in personam* is perhaps too narrow. It is neither. The adjudication of the Court upon the necessity of its creation, is *in personam*, the action of the administrator under it is not judicial, but ministerial. The authorities applicable to the execution of such powers, show how and where the same are to be tested.

Hawkins vs. Kemp, 3 East. 410.
Tatcher vs. Powell, 6 Wheat. 119.
Taylor vs. Galloway, 1 Hammond 232.
Loomis vs. McClintock, 10 Watts 274.
Young vs. Lorain, 11 Ills. 636. Il. 643
Smith vs. Hileman, 1 Scammon 323.
Schmidt vs. Gatewood. 2 Rich. Eq. 170
Denning vs. Smith, 3 Johns. Ch. 332.

V.

There was a distinct offer of testimony on the part of the plaintiffs to show collusion and fraud between Ripley and Defendant in Error. The matters contained in the record offered but ruled-out, show a necessity for an investigation, of all the facts surrounding these sales, by the jury. This was with-held.

The motion for a new trial was therefore improperly overruled.

For these reasons we ask that the judgment below be reversed and for a *venire de novo.*

All which is respectfully submitted,

BUTTRICK & HILL,
Attorneys for Pl'ffs in Error.
Milwaukee, Wisconsin.

James S. Brown
of Counsel

UNITED STATES OF AMERICA.

IN SUPREME COURT.

DECEMBER TERM, A. D. 1864.

CHARLES COMSTOCK, et als.,

Plaintiffs in Error,

against

JEFFERSON CRAWFORD,

Defendant in Error.

BRIEF AND POINTS FOR DEFENDANT IN ERROR.

GEORGE W. LAKIN, Attorney for Defendant in Error, Milwaukee, Wis.

Matthias C. Comstock died intestate on or about the 29th day of November, 1838, leaving personal property in Iowa County in the then Territory of Wisconsin. Charles Comstock, a brother of the deceased, was appointed administrator by the Judge of Probate of Iowa County, but as he was unable to attend to the business, he resigned and returned the letters of administration, without taking charge of the estate, or en-

tering upon the discharge of the duties of the trust. With his resignation, directed to the Judge of Probate, on the 31st October, 1839, Charles Comstock requested the Judge of Probate "to grant letters of administration *de novo* to his friend and brother-in-law, Mr. Edwin Ripley."

The resignation of Charles Comstock was accepted, and after due proceedings had, on the 12th day of February, 1840, Edwin Ripley, whose wife is a sister of the deceased, and of Charles Comstock, was appointed administrator, which, for aught that appeared to the contrary, was satisfactory to all concerned. His appointment and all of his acts were acquiesced in; at any rate, there is nothing to show that they were ever controverted, litigated or questioned in any way, until the lapse of nearly a *quarter of a century* after he entered upon the discharge of his trust.

And now, at this remote period, Charles Comstock and others, at whose request Mr. Ripley was appointed, propose to litigate his acts, not *directly* but *collaterally*, and to recover the land which the administrator sold and which is in the possession of *bona fide* purchasers, to pay the just debts of the deceased. There are 66 other suits by the same plaintiffs against other defendants in the Court below, involving a similar state of facts.

One question covers the whole ground of the defence, which if answered in the affirmative, settles the case in favor of the defendant, to-wit:

Is the sale of the land by the administrator, together with the deed made by him and the proceedings had, sufficient to pass the title of which the intestate died seized, to the purchaser? If the defendant shows title out of the heirs of the intestate, that is sufficient.

At the time of producing in evidence an exemplification of the record, showing the appointment of Charles Comstock, his resignation, the acceptance thereof by the Judge of Probate, &c., the defendant introduced and read in evidence the record, showing that on the 12th day of February, 1840, Edwin Ripley was appointed administrator by the Judge of Probate of Iowa County; that he gave the requisite bond with sureties, and filed the oath required by law, after which letters of administration were issued and delivered to him in due form, under the seal of the Court, a duly certified copy of which letters were read in evidence.

The defendant at the same time also introduced and read in evidence an exemplification of the record of the Probate Court of Grant County, showing that Edwin Ripley had made it apparent to said Probate Court

of Grant County, on the 3d day of April 1845, that he was administrator of said Estate in Jo Daviess County, Ills., and also that he was administrator in the Territory of Wisconsin, having been appointed by the Judge of Probate of Iowa County, Wisconsin Territory.

Said exemplification also contains the petition or application of said administrator, to sell so much of the real estate of the deceased, as will pay his just debts, amounting to the sum of $8,000; which petition is in due form. The record shows that the Court duly considered said petition, and ordered that notice thereof be given by publication in the "*Wisconsin Herald*" for four weeks successively, the last publication to be prior to the third Saturday of May, 1845, which was the day appointed for a hearing; which notice was given and published, and proof thereof filed and recorded, and the same was read in evidence.

The record shows that at the time and place appointed by the Probate Court, a hearing was had, and at that hearing the record shows that it was "made to appear unto that Court that it was necessary and proper that said administrator should be licensed and authorized and empowered to make sale of the real estate of said deceased, situated in Grant County, or so much thereof as will enable said administrator to pay the sum of eight thousand dollars debts due and owing from said estate, due proof of the existence and amount of said debts being made to this Court," &c.

The record also shows that the administrator gave bond; that the same was approved by the Court, and that thereupon the license issued.

The *original license* under the seal of the Court, with the original oath required by law indorsed thereon, was produced and read in evidence, the defendant first having given parol testimony that said license was issued to and retained by Edwin Ripley.

Said license and oath so read in evidence are in the words and figures following:

TERRITORY OF WISCONSIN, } ss.
GRANT COUNTY.

THE HONORABLE PROBATE COURT, IN AND FOR GRANT COUNTY AFORESAID.

To Edwin Ripley, administrator of the Estate of Matthias C. Comstock, late of Joe Daviess County, in the State of Illinois, deceased intestate.

Whereas it appears by the certificate of the Probate Justice, in and

for the County of Joe Daviess aforesaid, and by the records and files of the Probate Court of Grant County aforesaid, that the personal estate of said deceased, is not sufficient to pay his just debts by the sum of eight thousand dollars, and the costs attending said sale.

Therefore you are hereby licensed and empowered and authorized to sell so much of the real estate of said deceased at public auction, agreeably to law, as will be sufficient to pay the sum of eight thousand dollars and the legal costs and charges attending said sale. Before making any sale of said real estate, you will give thirty days public notice, by publishing notice of said sale, at least four weeks previous to said sale, (the first publication to be at least thirty days prior to said sale,) in the Wisconsin Herald, a weekly newspaper printed and published at Lancaster, in said County of Grant, Wis. Territory.

You will also make return of this warrant and of your doings herein, on oath to the Judge of Probate of Grant County aforesaid, as soon as may be.

In testimony whereof, I have hereunto affixed the seal of the Probate Court of Grant County, Wisconsin Territory, at Lancaster in said Territory, this 27th day of May, A. D. 1845.

H. R. COLTER,

[L. S.] Judge of Probate, Grant County, Wisconsin Territory.

OATH.

I Edwin Ripley administrator of the Estate of Matthias C. Comstock, late of Joe Daviess County, deceased do solemly (swear) that I will use my best skill and judgment in fixing on the time and place of sale and that I will exert my utmost endeavors to dispose of the same in such manner as will produce the greatest advantage to all persons interested therein and that without any sinister views whatever. So help me God.

Sworn and subscribed before me May 27th, 1845.

NELSON DEWEY,
Justice of the Peace of Grant Co., Wis. T'y.

(Signed,) EDWIN RIPLEY,
Administrator of Estate of M. C. Comstock.

The defendant also introduced copies of the "*Wisconsin Herald*," a weekly newspaper published in Grant County, Wisconsin Territory, containing notices of the sale.

No objection was urged, or question raised at the trial, as to the genuineness of said license, oath or notices of sale, nor any point reserved as to the sufficiency of the latter or of the publication thereof.

The defendant also produced and read in evidence the deeds of the administrator made and executed under the sale pursuant to the license containing the lands described in the declaration, and which deeds are in the usual form of administrators deeds, recite the license at length and were duly witnessed, acknowledged, delivered and recorded in the office of the Register of Deeds of Grant County.

These were all of the records, documents, notices and testimony that the defendant was able to produce. A formal report of the sale was probably made and filed in the Probate Office, but at this remote period nothing of the kind could be found except such as the deeds contain. Had the defendant been required to make his defence 15 years ago, more of the documents and files, no doubt, could have been found in the Probate Office. We have to rely on what we have been able to obtain. On the whole we have produced a more perfect record, than can be produced in most administrators's sales made so long ago, on the frontier.

Our proposition is, *that the proceedings of the administrator as shown in the record of this case, are sufficient in law to pass to the purchasers under the administrator's deed, the title to the premises of which the intestate died seized.*

The maintenance of this proposition establishes our defence, and overthrows all of the objections of the plaintiff raised at the trial. It is not necessary, nor is it incumbent on us in this collateral proceeding, to show that no error exists in the orders and adjudications of the Judge of Probate. They may be erroneous and yet valid and binding, until reversed on appeal by the proper appellate Court. The Revised Statutes of 1839, of Wisconsin Territory, page 297, Section 5, provides as follows:

"The District Courts within their own Districts, shall have appellate jurisdiction of all matters determined by the Judges of Probate, in their respective counties; and all appeals from any order, decree, denial or decision of any Judge of Probate, shall be made to said District Court accordingly; and the said District Court shall have cognizance in the first

instance of all matters wherein the Judge of Probate of any County is a party interested."

Sec. 6, on the same page provides when and how such appeal shall be taken. Sec. 9 provides that after appealing, "all further proceedings, in consequence of such order or decree shall be stayed until the final determination shall be had thereon." If the heirs or any one of them, or any party in interest were not satisfied with Edwin Ripley's appointment as administrator, or with any order, decree, sentence, denial or decision, made in the case, the statute afforded an adequate and direct remedy, and it was their duty to have sought and applied that remedy.

Error does not imply *invalidity* or *nullity*, as illustrative of this, the United States Courts have jurisdiction in actions between citizens of different states. Such citizenship must be set forth in the declaration. If omitted, the Supreme Court reverses the judgment of the Court below, on writ of error brought. But such judgment, if the allegation or citizenship is omitted, is not a nullity. It is good, valid and binding until reversed in due course, by the proper appellate Court.

The same principle applies in this case. To allow errors to be investigated and corrected in a collateral issue would defeat titles the world over, and there would be no end to litigation in any case.

Interest reipublicae ut sit finis litium.

The first objection urged to the record by the plaintiffs is "that it appears on the face thereof that the Probate Court of Iowa County had not jurisdiction to appoint an administrator of the Estate of Matthias C. Comstock, for at the time of his decease, he was not a resident of, or an inhabitant of the Territory of Wisconsin, and had no widow next of Kin or creditor residing therein. It does not appear that decedent had goods, rights, chattels and credits in the County of Iowa.

If we compare the objection with the record, it will be seen to be not well founded in fact. There is no direct allegation as to the decedent's being a citizen, resident or inhabitant of any State or Territory. It might be inferred by the phrase, "of Joe Daviess County, in" "the State of Illinois," that the decedent was, at some time, a resident or inhabitant of that county. But how the fact was, is left to conjecture. The fact of his being a resident or an inhabitant of Iowa County, Wisconsin Territory, is nowhere negatived by any averment in the record. But the jurisdiction of the Probate Court, did not depend upon the decedent's being

a resident or an inhabitant of Iowa County. The decedent, if a non-resident of the Territory of Wisconsin, at the time of his decease, leaving goods and chattels in the Territory, could have an administrator appointed in the Territory. Otherwise, what is to become of his rights, credits and effects there? What tribunal had jurisdiction to grant the letters of administration? No other than the Judge of Probate, in the County where the goods and chattels were. No attempt is made to controvert this position directly, though it is claimed that he had jurisdiction to grant letters of administration to the *Public administrator*, and to him alone. (See Revised Statutes 1839, page 83, section 1, 2 and 3.) It is sufficient for our purpose, that the Judge of Probate, had jurisdiction to grant letters of administration on the estate of the decedent. If he granted them to the next of Kin, when he should have granted them to the widow, or if he granted them to a brother-in-law of the decedent, at the request of the heirs, when he should have granted them to the public administrator, he may have erred. But there is nothing in that on which to raise a *jurisdictional* question. The Court had original general jurisdiction to consider the subject, and to determine whom to appoint. The person to whom the letters were issued and delivered thereupon, became the administrator *de facto*.

Besides, there is nothing to show that there was any person in Iowa or Grant County designated as public administrator. No such person claimed the administration in this case.

Now as to the branch of the objection that it does not appear that there were goods, rights and credits in Iowa County. The Probate Court upon the application of Edwin Ripley for letters, from the nature of the case, had to ascertain from some testimony, either oral or written, that the decedent left some personal effects in Iowa County. But it is not usual to incorporate the proofs into the letters. The testimony is not even preserved in any form for any considerable time. There is none recorded in this case, though it is stated in the letters granted that the intestate had "at the time of his decease, personal property in this Territory, which may be lost, destroyed or diminished in value, if speedy care be not taken of the same."

The plain inference and presumption are, that such property was in Iowa County, and that there was proof before the Court of the fact, unless we rashly conclude that Probate Courts are destitute of all judicial

ability. But to obviate all doubts in this case, we introduced a witness at the trial, Edwin Ripley, who testified that "there were horses, wagons &c., in *Iowa* County, of the value of $100, and claims for mineral due in *Grant* County.

We are to presume that the facts as they existed, and as we have proved they existed, were brought to the knowledge of the Judge of Probate, and that he passed upon them before issuing the letters.

The plaintiff's case is based upon the false theory that the Probate Court was solely a creature of the statute, inferior—not a Court of Record—and that every act or exercise of power by that tribunal, not expressly specified in and authorized by the Statute, is *coram non judice*, and void.

The theory is unsound, and was exploded years ago, if, which is doubted, it ever had any rational adherents.

There is but one reported case wherein the powers of this Probate Court of Wisconsin Territory were brought in review before the proper Appellate Court. And that is a case wherein a writ of error was taken from the judgment of Judge Colter of Grant County, Wisconsin Territory, the same judge who granted the order of sale and license in the case at bar.

See Chandler's Rep. 1 Vol. 136 page.
Bronson, et. al. vs. Burnett, et. al.

In that case the Probate Court revoked the letters of administration which had been granted to Bronson & Patch. An appeal was taken to the then United States District Court, and finally to the Supreme Court of the State.

In that case which is rather imperfectly reported, it was contended that the Probate Court must show a provision of the Statute for every exercise of power, and as the *statute* did not confer the power to revoke letters of administration, the Court had no *jurisdiction* to do the act, (as, in the case at bar, it is argued that the statute does not authorize the resignation of an administrator, nor the Court to accept such resignation or to appoint a successor.)

The appellate Courts affirmed the decision of the Probate Court and the Supreme Court say: "Probate Courts are only in a qualified sense the mere creatures of the Statute. They are as truly as any other judicial tribunals, the offspring of the common law. * * In that Country (Eng-

land) as in most, if not all, the States of the Union, they are Courts of Record, either by express statute or immemorial usage. * * The authority (to revoke) must be regarded as incident to the general powers of the Court, and indispensable to a right exercise of those powers."

The proceedings in the case last cited were had before the same Probate Court, that acted upon the letters granted by the Probate Court of Iowa County, and issued the license to sell real estate in the case at bar.

The argument, therefore founded upon the assumption of the inferiority of the Court, its want of incidental powers and its inability to act without an express provision of the Statute, specifying the thing to be done, is specious, though futile.

The act of the Legislature of Wisconsin Territory, approved Feb. 20, 1845, does not affect the case. That act is merely declaratory of what the law was, and was understood to be, long before its passage.

But suppose the letters granted in Iowa County, were irregularly issued, it appears by the record, that afterwards, to-wit: on the 3rd day of April, 1845, Edwin Ripley, presented to the Probate Court of Grant County, the evidence of his being appointed administrator in Joe Daviess County, Illinois, and also in Iowa County, Wisconsin Territory, together with his petition or application for license to sell real estate, and the Court last named, "*having duly considered the application.*" adjudicated upon the same, ordered publication, and at the time and place appointed for that purpose, the Court did "adjudge and decree that said administrator be licensed, authorized and empowered to sell so much of the real estate of said deceased, situated, lying and being in the County of Grant, as may enable said administrator, to pay the sum of eight thousand dollars, the debts owing from said estate," &c.

Here then, was another of the several opportunities for the heirs, or for any party, to contest the validity of the letters granted to Mr. Ripley, of his application for license, or of any matter connected therewith. Having jurisdiction of the *subject matter*, and acting within the scope of its authority, the Probate Court of Grant County, acted upon the letters, theretofore granted, all parties interested, having ample opportunity to object. The proceeding then became *res adjudicata*.

The Statute aforded ample opportunity for any party interested, to appeal.

We claim that the ERRORS OR MISTAKES OF THE PROBATE COURT, CAN

NOT BE ENQUIRED INTO OR TAKEN ADVANTAGE OF IN THIS COLLATERAL ACTION.

The principle which we contend for, has been recognized, passed upon and settled in cases without number.

We shall refer to a few of them only, as it would be a work of supererogation to encumber the argument with many authorities on a point so clear and well settled.

The case of Thompson vs. Tomlie, 2 Peters, 157, was an action of ejectment, wherein the defendant claimed title to the premises under a purchase made at a Commissioner's sale, by virtue of certain proceedings had in the Circuit Court, pursuant to the provisions of the laws of Maryland, relative to a division of the real estate of intestates in certain cases. The Court below decided that the commissioner's sale was void, and rendered judgment for the plaintiff. That judgment was reversed. The Court in its opinion say: "The general and well settled rule of law in such cases is, that when the proceedings are collaterally drawn in question, and it appears upon the face of them that the *subject matter* was within the jurisdiction of the Court, they are voidable only.

"The errors and irregularities, if any exist, are to be corrected by some direct proceeding, either before the same Court to set them aside, or in an Appellate Court."

* * * * In the same opinion the Court say: "The rules which apply to and govern titles acquired under sales made by order of Orphan's Courts and Courts of Probate in the State where said regulations are adopted, are applicable to the case now before the Court. The case of McPherson vs. Cunliff, 11 Serg. & Rawle, 429, was one of this description, and brought under the consideration of the Supreme Court of Pennsylvania, the effect of a decree of the orphans' Court in matters within its jurisdiction although founded in a mistake of facts." * * "When there is a fair sale," say the Court, "and the decree executed by a conveyance from the administrator the purchaser will not be bound to look beyond the decree, if the facts necessary to give the Court jurisdiction appear on the face of the proceedings. After the lapse of years, presumptions must be made in favor of what *does not appear*. If the purchaser was responsible for the mistakes of the Court in point of fact after they had adjudicated upon the facts, and acted upon them, these sales would be snares for honest men. The purchaser is not bound to look further back, than the order of

the court. * * That the decree of an Orphan's Court, in a case within its jurisdiction, is reversible only on appeal, and not collaterally, in another suit."

"In Perkins vs. Fairfield, 11 Mass. 227 in the Supreme Judicial Court, of Mass. it was held that a title under a sale by administration, by virtue of a license from the Court of common pleas, was good against the heirs of the intestate, although the license was granted upon a certificate of the Judge of Probate not authorized by the circumstances of the case. The Court said the license was granted by a Court having jurisdiction of the *subject.* If that jurisdiction was improvidently exercised, or in a manner not warranted by the evidence from the Probate Court, yet it is not to be corrected at the expense of the purchaser who had a right to rely upon the order of the Court as an authority emanating from a competent jurisdiction."

So in the case at bar, if the Probate Court of Grant County, upon the presentation of the letters of administration from the Probate Court of Iowa County and such other evidence as the Court required, whether written or oral, and which the law did not require the Court to record, or to preserve in any way, exercised its jurisdiction improvidently, or in a manner not warranted by the evidence it makes no difference in this case, so long as the Probate Court had general jurisdiction over the subject. The heirs stood by, and saw the sale and purchase, and the money applied to the payment of the debts for which the property was liable. And now having received the benefit of the money, they seek to recover the property!

The case of McPherson vs. Cunliff et als., 11 Serg. and Rawle 422, which is sanctioned in the case of Thompson vs. Tomlie, in 2nd Peters, abounds with sound principles of law. The Court say, that "the principle on which I hold the sentence or decree of the orphans Court, *conclusive* is, that it is a general rule of our law, that where any matter belongs to the jurisdiction of one Court so peculiarly, that other Courts can only take cognizance of the same subject, incidentally and indirectly, the latter are bound by the sentence of the former, and must give credit to it."

* * * "Such a sentence as the one we are considering, is definitive —it passes in *rem judicatam*—the thing is finally judged, not without appeal, for that is given to this court, &c."

* * * It is a proceeding purely *in rem* against the estate of the in-

testate, and not *in personam.* * * The estate was condemned to a sale, and may well be compared to a condemnation of goods by a Court of exchequer, whose condemnation is final in an action brought to try the right of the goods. * * The condemnation divests the property. I mean the title of the deceased.

The Court recognize the soundness of the case of Griffith vs. Frazer, 8th Cranch 25, which is relied on by the plaintiff, and which simply decides, that there being one sole executor duly qualified, and his appointment not reversed, annulled or otherwise vacated, the appointment of another was void, and a sale made upon a judgment against him conveyed no title. The appointment of an administrator on the estate of a living man, is a nullity, and so is the appointment of an administrator, while there is an executor of the decedent in the discharge of the duties of his trust. The point is about as plain as that in natural philosophy, that two bodies cannot occupy the same space at the same time.

The case of Griffith vs. Frazer, does not conflict in the least with our position.

In McPherson vs. Cunliff, the Court recognize the soundness of the doctrine that parol evidence may be received of a sale, which had not been returned. Numerous authorities are referred to in that case, in support of sales made in cases similar to the case under consideration, and to which the attention of this Court is called.

In the case of Voris vs. Smith, 13 Serg. and Rawle, 335–6, the Court say: "There is no surer principle of Law, than that a third person shall not be affected by mere irregularity in a proceeding which has not been reversed by a Court of competent jurisdiction."

See also, Thompson vs. McGaw, 2 Watts, 164.

The case of Grignon's lessee vs. Astor, 2 How. 319, disposes of the case at bar. The Court say that "on a proceeding to sell the real estate of an indebted intestate, there are no adversary parties, the proceeding is *in rem*, the administrator represents the land; they are analogous to proceedings in admiralty, where the only question of jurisdiction is the power of the Court over the thing, the subject matter before them, without regard to the persons who may have an interest in it; all the world are parties. In the Orphan's Court, and all Courts who have power to sell the estate of intestates, their action operates on the *estate*, not on the

and whether they existed or not is wholly immaterial, if no appeal is taken." So in the case at bar. Then why trouble ourselves about where the intestate last resided, or, of what place he was an inhabitant, or whether or not he left goods and chattels in Iowa County?

The statute did not require the "representation" or application to sell real estate, to be in writing. An oral representation was sufficient, (see Revised Statutes 1839, page 316, sec. 25.) though in the case at bar, it was made in writing, and filed.

The 2d objection taken in the Court below is that the Probate Court of Iowa County had no power to accept the resignation of Charles Comstock, and to appoint Edwin Ripley.

This objection is based upon the theory already alluded to that there were no powers incidental to the Court, and that it was restricted in its action to the letter of the Statute.

Upon principle, we ask what is to be done, in case an administrator after having given bond and taken the oath, for some cause not enumerated in the statute, finds it impossible or impracticable for him to discharge the duties of the trust? Or suppose he refuses to act, without assigning any cause, and thereupon in either case tenders his resignation. To answer as those who claim that there can be no resignation, are obliged to do, that the Court is to remove the appointee, or revoke his letters, is to answer in effect, that the Court is to acquiesce in or accept the resignation.

There are but few reported cases wherein the right to resign, and the authority of the Court to accept a resignation have been questioned though we can find numerous instances wherein resignations have taken place. The point has been so obvious, that but a small amount of litigation has been based upon it. Yet we are not without good authority to sustain our position. But whether we are right or not in our position it is difficult to perceive how the objection can be moulded into a valid jurisdictional question, so as to render the acts of the administrator void.

The case of Steen vs. Bennett, 24 Ver. 303, also Marsh. vs. The People, 15 Ills, 284, are in point. The statutes in neither of those States provided that an administrator might resign, yet the Courts conclude that a resignation accepted by the Judge of Probate vacates the

late of the County of Brown, deceased, was filed by his attorney, H. S. Baird, praying for an order from the Court, to authorize him to dispose of the real estate of said Pierre. In consideration of the facts alleged in said petition, and for divers other good and sufficient reasons, it is ordered that he be empowered as aforesaid. Minutes, read, corrected and signed by order of the Court."

The petition itself, was not at hand, nor was its contents shown, except so far at stated in the minutes of the Court given above.

The Court granting the license, nowhere found or decided, in form, that the personal property of the deceased, was insufficient to pay the debts, although it was stated in the license, "that it had been ascertained by said *petitioner*, that the goods and chattels belonging to the estate of said deceased, are insufficient to pay all the just debts, which he owed at the time of his death."

Yet the Supreme Court of the Territory sustained the judgment of the Court below, and that judgment was re-affirmed, as reported in 2 How, 319.

The plaintiff concedes the law to be as laid down in *Grignon vs. Astor*, but argues the inapplicability of that case, and urges that the record of the Court, granting the license in that case, was *perfect and complete;* that it emanated from a Court of general jurisdiction; that the record in this case comes from a Court of limited and inferior jurisdiction; that the judgment in that case was *in rem*, &c.

We insist that the two Courts, the one in Brown County and the other in Grant County, stood upon an equality in respect to their jurisdiction of the subject matter. That neither of the Courts were *inferior* in the technical sense of the term, and the assertion that the record in the one case is *perfect* and complete, is negatived and disproved by an inspection of the record. The judgment in the one case is as much *in rem*, as in the other. The real estate of the decedent in Grant County was a matter of record. That real estate was acted upon by the judgment of the Probate Court "*having original general jurisdiction over the particular subject.*" There was no uncertainty about it. *Id certum est quod certum reddi potest.*

And as the Court say in the Grignon case, "*the granting the license to sell* is an adjudication *upon all facts* necessary to give jurisdiction,

and whether they existed or not is wholly immaterial, if no appeal is taken." So in the case at bar. Then why trouble ourselves about where the intestate last resided, or, of what place he was an inhabitant, or whether or not he left goods and chattels in Iowa County?

The statute did not require the "representation" or application to sell real estate, to be in writing. An oral representation was sufficient, (see Revised Statutes 1839, page 316, sec. 25.) though in the case at bar, it was made in writing, and filed.

The 2d objection taken in the Court below is that the Probate Court of Iowa County had no power to accept the resignation of Charles Comstock, and to appoint Edwin Ripley.

This objection is based upon the theory already alluded to that there were no powers incidental to the Court, and that it was restricted in its action to the letter of the Statute.

Upon principle, we ask what is to be done, in case an administrator after having given bond and taken the oath, for some cause not enumerated in the statute, finds it impossible or impracticable for him to discharge the duties of the trust? Or suppose he refuses to act, without assigning any cause, and thereupon in either case tenders his resignation. To answer as those who claim that there can be no resignation, are obliged to do, that the Court is to remove the appointee, or revoke his letters, is to answer in effect, that the Court is to acquiesce in or accept the resignation.

There are but few reported cases wherein the right to resign, and the authority of the Court to accept a resignation have been questioned though we can find numerous instances wherein resignations have taken place. The point has been so obvious, that but a small amount of litigation has been based upon it. Yet we are not without good authority to sustain our position. But whether we are right or not in our position it is difficult to perceive how the objection can be moulded into a valid jurisdictional question, so as to render the acts of the administrator void.

The case of Steen vs. Bennett, 24 Ver. 303, also Marsh. vs. The People, 15 Ills, 284, are in point. The statutes in neither of those States provided that an administrator might resign, yet the Courts conclude that a resignation accepted by the Judge of Probate vacates the

late of the County of Brown, deceased, was filed by his attorney, H. S. Baird, praying for an order from the Court, to authorize him to dispose of the real estate of said Pierre. In consideration of the facts alleged in said petition, and for divers other good and sufficient reasons, it is ordered that he be empowered as aforesaid. Minutes, read, corrected and signed by order of the Court."

The petition itself, was not at hand, nor was its contents shown, except so far at stated in the minutes of the Court given above.

The Court granting the license, nowhere found or decided, in form, that the personal property of the deceased, was insufficient to pay the debts, although it was stated in the license, "that it had been ascertained by said *petitioner*, that the goods and chattels belonging to the estate of said deceased, are insufficient to pay all the just debts, which he owed at the time of his death."

Yet the Supreme Court of the Territory sustained the judgment of the Court below, and that judgment was re-affirmed, as reported in 2 How, 319.

The plaintiff concedes the law to be as laid down in *Grignon vs. Astor*, but argues the inapplicability of that case, and urges that the record of the Court, granting the license in that case, was *perfect and complete;* that it emanated from a Court of general jurisdiction; that the record in this case comes from a Court of limited and inferior jurisdiction; that the judgment in that case was *in rem*, &c.

We insist that the two Courts, the one in Brown County and the other in Grant County, stood upon an equality in respect to their jurisdiction of the subject matter. That neither of the Courts were *inferior* in the technical sense of the term, and the assertion that the record in the one case is *perfect* and complete, is negatived and disproved by an inspection of the record. The judgment in the one case is as much *in rem*, as in the other. The real estate of the decedent in Grant County was a matter of record. That real estate was acted upon by the judgment of the Probate Court "*having original general jurisdiction over the particular subject.*" There was no uncertainty about it. *Id certum est quod certum reddi potest.*

And as the Court say in the Grignon case, "*the granting the license to sell* is an adjudication *upon all facts* necessary to give jurisdiction,

Circuit before Judge Dixon. An appeal was taken to the Supreme Court, where Judge Dixon took no part in the hearing or decision. Judges Cole and Paine disagreed and gave separate opinions, so that, technically, the judgment in that case was affirmed. We are perfectly free to examine and test the soundness of that decision. If unsound, there is no reason why it should influence the judgment of this Court.

In that case, Judge Paine, in his reported opinion, says: "There was no express resignation of the trust." (by the administrators) "It is true they asked to be discharged," "but that seemed to be based upon the idea that they had, as they alleged, duly administered the estate," though it appeared that there were debts unpaid and real estate unsold. The Judge then goes on to show its similarity to the case in 27 Ala., 273, wherein an administratix made a similar return and procured a similar order of the Court, whereupon the Court appointed an administrator *de bonis non*, which appointment was adjudged void for reason that the administratix had simply procured a settlement of her account, but that nothing had been done to extinguish her authority as administratix, that is to say, that she was still administratix, not having resigned or procured any action of the Court displacing her.

By the record of that case, it is shown that it was not necessary for the Court to pass upon the ability of an administrator to resign, or of the power of the Court to accept his resignation.

Then, if it appears in that case, as it clearly does, and as stated by the Judge that there was no express resignation of the trust, and that by the proceedings of the administrator and the Court, the authority of the first administrator was not extinguished, and that therefore the appointment of the administrator *de bonis non* was void, that was sufficient to dispose of that case.

The Judge however, subsequently, passes upon the question upon the hypothesis that the administrators did actually resign, and that the Judge of Probate appointed an administrator *de bonis non*.

We will therefor consider the case, as though the question of resignation and acceptance was really raised and adjudicated upon. The Judge assumes the rule to be, "that the powers of these Courts, (Probate Courts,) are derived entirely from Statute." This assumption is not well found-

ed, and hence, the erroneous conclusions to which it leads. These Courts, though constituted by Statute, derive some of their powers from the Common Law, as stated in the case of Bronson vs. Burnett, 1st Chandler, page 140, they are not mere creatures of the Statute, and, from necessity, are obliged to do many acts, unknown to the Statute, as incidental to their jurisdiction. Judge Paine says, that when the question, (of resignation and the appointment, *de bonis non*,) was suggested, he was strongly of the opinion, that such power existed. He was, no doubt, satisfied that it ought to exist, but could not *find it in the Statute*.

But in the cases cited in the opinion, which are nearly all cases of *executors*, and not of *administrators*, it appears to be held that they could resign, and that the Court could accept their resignation at any time before they *intermeddled* with the goods of the testator, or administered his effects.

Charles Comstock never intermeddled with the estate of the decedent, nor administered in any way. Therefore, within the rule laid down, (as recognized in the cases cited,) as applicable to executors, it was competent for him to resign, and for the Court to accept his resignation.

Judge Paine says, "I think the law should provide for such resignation," and "I have come unwillingly to the conclusion stated," a conclusion to which an able lawyer, as he is known to be, he would never have arrived, but for a mistake in the premises, that to authorize the action of the Court, it was necessary for the Statute, to provide for the resignation.

We invite the attention of the Court to the opinion of Judge Cole, (13 Wis. 291,) whose conclusions are drawn from correct premises; together with the authorities cited by him.

Perkins vs. Fairfield, 11 Mass. 227.
Brown vs. Wood, 17 Mass. 68.
Groff vs. Groff, 14 S. and R. 181.
Jackson vs. Robinson, 4 Wend. 436.
McFrail vs. Crawford, 12 Wend. 533.
Tryon vs. Tryon, 16 Vt. 313.
Williams vs. Sharp, 2 Carter (Ind.) 101.
Brown vs. Lanman, 1 Conn. 467.

The plaintiff says, that the "*main point*" in his case is that "the Court did not find facts sufficient to warrant the issuing of a license"—that "the all important fact that the goods and chattels belonging to the estate were insufficient to pay them, nowhere appears." &c.

The record does show that on the 3d day April, 1845, Edwin Ripley administrator, &c., "filed in the office of the Probate Court of Grant County his written application for license, and authority to sell so much of the real estate of said deceased, lying and being in Grant County, as may be necessary to enable said administrator to pay the sum of eight thousand dollars." That written application is a part of the record, and states among other things, "*that the personal estate of said deceased is not sufficient to pay his debts by the sum of eight thousand dollars*; and prayed the Court to grant him license to sell so much as to enable him to pay that sum. Then after due notice had been given, and proof thereof filed at the time and place specified in the notice, to-wit: on the 3d Saturday of May, 1845, the record shows that, "it being made to appear unto this Court, that it is necessary and proper that said administrator should be licensed and authorized and empowered to make sale of the real estate of said deceased, situated in Grant County or so much thereof as will enable said administator to pay the sum of eight thousand dollars debts due and owing from said estate due proof of the existence and amount of said debts being made to this Court, &c."

"The Court adjudge and decree that said administrator be licensed. &c."

It was not required by the statute, nor was it ever usual in practice, for the Court to incorporate into the record all of the evidence or testimony, by which the truth of the allegations in the application or petition, was made to appear to the Court. It does not follow, because the certificate of Charles G. Thomas, the Probate Judge of Joe Daviess County, Ills., was filed, that *that* was the only evidence by which the truth of the allegations in the petition was shown. If there is any meaning in language, it is apparent by an inspection of the record, that the Court did then and there adjudicate upon the petition or application, and found that said application was sustained by the requisite testimony, and entered a decree of record accordingly. It is perfectly clear that the Court did inquire into and determine the existence of the facts stated in the

petition. One of the facts therein stated is "*that the personal estate of said deceased is insufficient to pay the debts of said deceased by the said sum of eight thousand dollars.*

What then becomes of the *main point* in the plaintiff's case?

The plaintiff urges that "there was no proof of a license." The objection is not founded in fact. The bill of exceptions shows, that "the defendant offered parol testimony to prove that the license was issued to and retained by Edwin Ripley, and that the Court admitted said evidence." The original license under the seal of the Court, a copy of which is contained in the bill of exceptions, was introduced in evidence. No question was raised as to its genuineness, though it was proved to be the license that was issued to Edwin Ripley. The oath of the administrator was endorsed upon, and accompanied the license. The printing the notices of sale in the "Wisconsin Herald" was shown by producing said newspapers containing the requisite notices. No special objection was urged against them, nor against the proof of their publication, nor any special point reserved against their sufficiency. The proof therefore adduced must be taken to have been co-extensive with the requirement of the law.

We introduced in evidence the license, oath, the newspaper notices of sale, &c., not because we deemed them necessary to show that the title passed to the purchaser, nor because they were required by the Court, but simply for the reason, that even after the lapse of nearly twenty years, we were fortunate enough to be able to obtain them, and to negative any suspicion that there was any unfairness in the transaction of the business. We submit that titles to real estate, under sales of this kind, are not to depend upon the loss or the non-production of papers or notices of this sort.

Administrator's sales are not analogous to sales of land for taxes. The former are under the supervision of the Court. If any error is committed in any stage of the proceedings, the party interested has his remedy by appeal. The sale is made to pay the just debts of the deceased. Taxes are burdens, imposed by law. The party has no day in Court, and no opportunity to contest at the different stages of the proceedings, and no remedy by appeal. Hence the rule in the latter case,

to require a strict compliance with the requirements of the Statutes.

The record offered by the plaintiff, after the defendant rested, was altogether irrelevant. The Court was trying the *legal* title to the premises. It was not competent for the plaintiff, then and there to make out a case in equity, by alleging *fraud*, accident or mistake. It is not worth while to reply to the imputations of collusion and fraud between Mr. Ripley and the defendant, though they are entirely without foundation. They have no bearing upon the issue.

The statements "outside of the record," in regard to the fortune left by the decedent, and the management of the estate by the administrator, require no response.

The estate of the decedent consisted in wild and unproductive lands, which were a constant burden in the way of taxes. The probability is, that it would have been a loosing business for any man, to have received those lands, as a gratuity, and to have paid the taxes on them, from the time of the death of Matthias C. Comstock, to the present time. It is difficult to see how the heirs, who have slept upon their alleged rights for nearly twenty years, and who now set up their stale claim, have equities paramount to the *bona fide* purchasers, who have paid the taxes on the lands for so long a time. When they file their bill in form, containing the proper allegations, then, and not till then, will be the time for us to respond.

The law, as settled in Grignon vs. Astor, has been relied on for years. It has promoted confidence in administrator's sales, so that lands, at such sales, have brought their value. Now to establish a different or a more rigid rule, would destroy all confidence in such sales, so that all estates of deceased persons, which consist in lands, which have to be sold to pay debts, would seek for purchasers in vain. Such estates would be worthless, and all efforts to make sales to pay the debts of the deceased, would be regarded as "*snares for honest men.*"

We rely on the law, as settled in the case of *Grignon vs. Astor*, and on numerous decisions of similar import, in the several States. If these shall now be overthrown, a vast number of families will be turned out of their homes, and reduced to penury and destitution.

It is submitted that the judgment of the Court below should be affirmed.

GEORGE W. LAKIN,
Att'y and of Counsel for Def't in Error.
Milwaukee, Wisconsin.

ADDENDA.

The decision in the case of *Grignons Lessee vs. Astor*, 2 How. 319, was made under the statutes of Michigan Territory, then embracing what was, subsequently, Wisconsin Territory. And the statutes under which the sales were made in the *Grignon* case, and in the case at bar, were substantially the same. Wisconsin formed a part of Michigan Territory and derived the Statute of 1839, therefrom. Though the Court in Michigan was called the *County Court*, and in Wisconsin it was called the Probate Court, they were the same Court, *mutatis mutandis*, except in name. Now in the State of Wisconsin, the Probate Court and County Court are identical, as they were in Michigan Territory. By the statute of Michigan Territory the application to sell real estate could be made to the Supreme judicial Court, or to the County Court in the County where the deceased person last dwelt, or in the County where the real estate was. It was not necessary to apply to the Court that granted the letters of administration. So the statute of Wisconsin Territory under which the sale in the Case at bar was made (see Revised Statute, 1839, page 316, Sect. 25,) provides that application may be made to, and the license granted by, the *District* or *Probate Court* of the County where the deceased person last dwelt, "*or in the County where the real estate lies.*" The decision in Case of Bronson et. al. vs. Burnett, et. al. referred to on 8th page of this brief, was made, under the Revised Statutes of 1839, under which the sale in the Case at bar was made. In that case, the powers and duties of the Probate Court were to some extent defined.

There is nothing in the Probate records that contradicts the assumption that Edwin Ripley was a creditor of the intestate and therefore entitled to letters of administration. The inference is, that it was so made to appear. But whether it was, or not, is of no importance, as no objections were made to his appointment. (See Revised Statutes of Wisconsin Territory, 1839, page 85, Sects. 8 and 10.) In the case at bar, it appears by the Probate records that Charles Comstock, to whom letters of administration were granted, in the first instance, was not a resident of Wisconsin Territory. He was liable to be removed, by the Probate Court, under Sect. 6, page 311, of the Revised Statutes 1839. Was it not competent for Charles Comstock to anticipate such removal, by resigning? Or must he hold on and refuse to account after notice, so as to enable the judge of Probate to remove him? The decision of Judge Paine in the Case of Sitzman vs. Pacquette, 13 Wis. 292, is founded on the as-

ADDENDA.

The decision in the case of *Grignons Lessee vs. Astor*, 2 How. 319, was made under the statutes of Michigan Territory, then embracing what was, subsequently, Wisconsin Territory. And the statutes under which the sales were made in the *Grignon* case, and in the case at bar, were substantially the same. Wisconsin formed a part of Michigan Territory and derived the Statute of 1839, therefrom. Though the Court in Michigan was called the *County Court*, and in Wisconsin it was called the Probate Court, they were the same Court, *mutatis mutandis*, except in name. Now in the State of Wisconsin, the Probate Court and County Court are identical, as they were in Michigan Territory. By the statute of Michigan Territory the application to sell real estate could be made to the Supreme judicial Court, or to the County Court in the County where the deceased person last dwelt, or in the County where the real estate was. It was not necessary to apply to the Court that granted the letters of administration. So the statute of Wisconsin Territory under which the sale in the Case at bar was made (see Revised Statute, 1839, page 316, Sect. 25,) provides that application may be made to, and the license granted by, the *District* or *Probate Court* of the County where the deceased person last dwelt, "*or in the County where the real estate lies.*" The decision in Case of Bronson et. al. vs. Burnett, et. al. referred to on 8th page of this brief, was made, under the Revised Statutes of 1839, under which the sale in the Case at bar was made. In that case, the powers and duties of the Probate Court were to some extent defined.

There is nothing in the Probate records that contradicts the assumption that Edwin Ripley was a creditor of the intestate and therefore entitled to letters of administration. The inference is, that it was so made to appear. But whether it was, or not, is of no importance, as no objections were made to his appointment. (See Revised Statutes of Wisconsin Territory, 1839, page 85, Sects. 8 and 10.) In the case at bar, it appears by the Probate records that Charles Comstock, to whom letters of administration were granted, in the first instance, was not a resident of Wisconsin Territory. He was liable to be removed, by the Probate Court, under Sect. 6, page 311, of the Revised Statutes 1839. Was it not competent for Charles Comstock to anticipate such removal, by resigning? Or must he hold on and refuse to account after notice, so as to enable the judge of Probate to remove him? The decision of Judge Paine in the Case of Sitzman vs. Pacquette, 13 Wis. 292, is founded on the as-

sumption that the record *affirmatively* showed that there was no cause for a removal. Judge Paine, would, no doubt, admit that an administrator could resign for a cause which would justify his removal. In the Case at bar, a cause existed, within the spirit of the Statute, for the removal of Charles Comstock.

So that judge Paine might adhere to his decision, and yet grant all that is contended for by the defendant in the case at bar.

The Revised Statutes of 1858, page 649, Sect. 13, provides as follows: "The jurisdiction assumed in any case by a Judge of the County Court, so far as it depends on the place of residence of any person, or the location of his estate, shall not be contested in any action or proceedlng whatever, except in an appeal from the County Court in the original case, or when the want of jurisdiction appears on the same record."

It must be borne in mind that the *County and Probate Courts* are the same.

The Session Laws of Wis., 1861, Chap. 127, Page 145, provide as follows: "Every sale heretofore made, or hereafter to be made, of the estate of any deceased person, in pursuance of any order or authority of any County Court or Court of Probate, by any executor or administrator, or any person acting as such, in pursuance of any such order, license or authority, shall be deemed to be as valid and effectual as if made by the judgment or order of a Court having general jurisdiction; and the title of any purchaser, at any such sale, made in good faith, shall not be impeached or invalidated by reason of any omission or error in the appointment of such executor or administrator, or by reason of any defect or irregularity in the proceedings before such Court or any allegation of the want of jurisdiction on the part of such Court," &c.

The above statutory enactments are remedial in their nature, daclaratory of what the law was before their enactment, and intended to give effect to existing rights. Such enactments are held to be constitutional and valid, and are fully sustained by the following cases:

Wilkinson vs. Leland, 2 Peters, 654.
Hastbrouk vs. City of Milwaukee, 13 Wis. 38.
Chandler vs. Northrop, 24 Barbous Sup. Court Rep. *pap 114*

The case last named recites, New York, Sess. Laws, 1850, Ch. 82, Sec. 1, of which, Sec. 1, of Wis. Sess. Laws, 1861, above referred to, is a literal copy. In that case it was claimed that the act changed and interfered with vested rights. And that it was unconstitutional. But the Court decided otherwise, and sustained the enactment to its fullest extent holding that the act was remedial and that it should be liberally construed. And that it included all previous sales.

GEORGE W. LAKIN,
Atty and of Counsel for Def't. in Error.